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No. 05-493

FILED
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SUPREME COURT, U.S.

In The Supreme Court of the United States

ROBERT AYERS, Acting Warden,

Petitioner,

v.

FERNANDO BELMONTES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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CAPITAL CASE

INDEX

Page

Chronological List of Relevant Docket Entries 1

Excerpts from the Reporter's Transcript on State Appeal:

Defense Penalty Phase Evidence 4

Penalty Phase Instruction Conference 117

Prosecution Closing Argument 146

Belmontes' Allocution 161

Defense Closing Argument 165

Court's Instructions 174

Juror Questions and the Court's Responses 188

Proceedings Regarding Rereading Testimony 192

Jury's Entry of Verdict 199

Relevant Portions of Appellant's Opening Brief to the United States Court of Appeals for the Ninth Circuit, Case Number 01-99018 207

Relevant Portions of Appellee's Brief to the United States Court of Appeals for the Ninth Circuit, Case Number 01-99018 215

Relevant Portions of Appellant's Reply Brief to the United States Court of Appeals for the Ninth Circuit, Case Number 01-99018 224

Respondent's Motion for Rehearing and Suggestion for Rehearing En Banc to the Ninth Circuit, Case Number 01-99018 236

Appellant's Opposition to Motion for Rehearing and Rehearing En Banc 253

INDEX – Continued

Page

Ninth Circuit Order of August 2, 2005, for Parties to Submit Briefing Regarding Rehearing En Banc 267

Respondent's Brief in Response to the Ninth Circuit August 2, 2005, Order 268

Appellant's Brief in Response to the Ninth Circuit August 2, 2005, Order 281

Order of the Ninth Circuit Denying Rehearing En Banc, filed October 24, 2005 290

The following opinions, decisions, judgments, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Opinion, California Supreme Court, filed June 23, 1988 (Pet. App. A) 147a

Memorandum of Opinion and Order, United States District Court, Eastern District of California, filed August 15, 2000 (Pet. App. A) 101a

Order and Amended Opinion, United States Court of Appeals for the Ninth Circuit, filed July 15, 2003, amended November 20, 2003 (Pet. App. A) 1a

Order, United States Court of Appeals for the Ninth Circuit, filed February 5, 2004 (Pet. App. A) 85a

Opinion, United States Court of Appeals for the Ninth Circuit, filed July 15, 2005 (Pet. App. A) 230a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 4, 1994 – Fernando Belmontes filed his Second Amended Petition for Writ of Habeas Corpus in the United States Court for the Eastern District of California.

May 14, 2001 – District Court Judge David F. Levi issued a Memorandum, Opinion and Order denying habeas corpus relief.

October 9, 2001 – Judge Levi issued an Order granting Belmontes' application for a certificate of appealability as to various claims.

December 5, 2002 – Belmontes' Appeal was argued and submitted to Judges Stephen R. Reinhardt, Diarmuid F. O'Scannlain, and Richard A. Paez, Circuit Judges.

July 15, 2003 – The Ninth Circuit Panel filed an Opinion, reversing in part and affirming in part, with a partial concurring and partial dissenting Opinion issued by Judge O'Scannlain.

July 28, 2003 – The Warden of the California State Prison at San Quentin (hereinafter "Warden") filed a Petition for Rehearing and Petition for Rehearing En Banc.

August 19, 2003 – Circuit Judge Reinhardt issued an Order directing Belmontes to file a response to the Petition for Rehearing and Petition for Rehearing En Banc.

September 9, 2003 – Belmontes filed a response to the Petition for Rehearing and Petition for Rehearing En Banc.

November 20, 2003 – The Ninth Circuit Panel filed an Amended Opinion, superseding the July 15, 2003, Opinion but making no substantive changes from the earlier Opinion.

February 5, 2004 – The Ninth Circuit Panel filed an Order Denying Rehearing; a majority of the Ninth Circuit issued an Order Denying Rehearing En Banc, with dissents filed by Circuit Judges Diarmiud F. O'Scannlain, Consuelo M. Callahan, Stephen S. Trott, Andrew J. Kleinfeld, Ronald M. Gould, Richard C. Tallman, Jay S. Bybee, and Carlos T. Bea, with respect to the denial of en banc rehearing.

February 17, 2004 – Judge Reinhardt granted the Warden's Motion to Stay the Mandate for 90 days pending the Warden's filing of a Petition for Writ of Certiorari in the United States Supreme Court.

April 30, 2004 – The Warden filed a Petition for Writ of Certiorari in the United States Supreme Court in case number 03-1503.

March 28, 2005 – The United States Supreme Court granted the Warden's Petition for Writ of Certiorari in case number 03-1503 and remanded the matter to the Ninth Circuit with an order for further consideration in light of *Payton v. Brown*, 544 U.S. __ (2005)

July 15, 2005 – The Ninth Circuit Panel filed an Opinion, authored by Judge Reinhardt, reversing in part and affirming in part, with a partial concurring and partial dissenting Opinion issued by Judge O'Scannlain.

July 19, 2005 – Judge Reinhardt granted the Warden's Motion to Stay the Mandate for 90 days pending the

Warden's filing of a Petition for Writ of Certiorari in the United States Supreme Court.

August 2, 2005 – Judge Reinhardt issued an Order for both parties to file briefing setting forth their respective positions as to whether this case should be reheard en banc.

August 23, 2005 – Belmontes filed his brief pursuant to the Ninth Circuit's August 2, 2005, Order.

August 24, 2005 – The Warden filed his brief pursuant to the Ninth Circuit's August 2, 2005, Order.

October 24, 2005 – A majority of Ninth Circuit Judges declined to entertain en banc rehearing in this matter.

[2199] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	No. 32183
vs.	)	Dept. No. 7
FERNANDO BELMONTES,	)	
Defendant.	)	

The above-entitled matter came on regularly for hearing on Friday, July 30, 1982, at the hour of 10:17 a.m., before HON. WILLIAM R. GIFFEN, Judge of the Superior Court of the State of California, for the County of San Joaquin.

REPORTED BY: VICKI MARIE HAUNER, C.S.R. No. 4098
and JOHN SQUIRES, C.S.R. No. 2001

* * *

[2312] THE COURT: Mr. Schick?

MR. SCHICK: I stated my position on the record prior.

THE COURT: Stand admitted.

(Whereupon People's Exhibits Numbers 30 and 31 were received in evidence.)

MR. SUEYRES: People rest.

THE COURT: Mr. Schick.

MR. SCHICK: My first witness, Judge, will be Michael Salvaggio, please.

Mr. Salvaggio, come up this way please, sir. Come through the swinging gate and over by the court reporter.

Stop right there and raise your right hand, sir, the clerk will swear you in.

MICHAEL SALVAGGIO,

called by the Defendant, having been sworn, testified as follows:

THE COURT: Right up here please, sir.

We'd ask you state your full name for the record, please.

THE WITNESS: Michael Salvaggio, S-a-l-v-a double g-i-o.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mr. Salvaggio, what is your current residence address?

[2313] A. My residence?

Q. Yes.

A. 841 Vesta (phonetic) Street, Ontario.

Q. Ontario, California?

A. Right.

Q. How long have you lived there?

A. About 25 years.

Q. And are you currently employed?

A. I'm a car dealer.

Q. Self-employed?

A. Yes.

Q. How long have you been in that business?

A. Since 1946.

Q. Are you related in any way to the young man seated to my right, Fernando Belmontes?

A. It is my grandson.

Q. And through which of his parents are you related to him?

A. Which of my parents?

Q. To which of his parents?

THE COURT: Is he the son of your daughter?

THE WITNESS: Yeah, son of my daughter.

MR. SCHICK: Your daughter?

A. Right.

Q. I assume you've known Mr. Belmontes, Jr. for most of his life?

A. That's right.

Q. Where did you grow up?

[2314] A. Pardon me?

Q. Where did you come from before you came to California?

A. From New York.

Q. Are you Mexican-American background?

A. No.

Q. What extraction?

A. I'm Italian.

Q. What about Mr. Belmontes' father, Fernando Belmontes, Sr., is he Italian also?

A. No, he was a Mexican.

Q. How old was your daughter when she and Mr. Belmontes, Sr. were married?

A. 16 years old.

Q. And was this done with your permission?

A. No.

Q. How long after they were married did Fernando Belmontes, Jr., was he born?

A. About a year.

Q. Okay. Did you have contact with your daughter and her family after Fernando Belmontes, Jr., was born?

A. All the time.

Q. Could you describe for the jury what the circumstances were like in the first few years?

A. The circumstances, you wouldn't believe it. He married my daughter. He ran away and got married. And he brought my daughter to where he was living and it was a chicken coop converted into a one bedroom home. That was their room that they lived in.

[2315] Q. Was he employed at that time?

A. No.

Q. Did you help him to gain employment?

A. I put him in business, yes.

Q. What sort of business did you put him in?

A. Well, I am a car dealer and I was – and I put him in for detailing cars and got him work for other dealers and stuff like that.

Q. And did that enable him to support his family?

A. He drank it away.

Q. Did you observe the home life of your daughter and Fernando Belmontes, Sr.?

A. Yes, I did. It was terrible.

Q. In what way?

A. First of all, they never had a place to live or anything. I did nothing but give them money.

Q. For what reasons did you give them money?

A. To live. He didn't want to work. The man never wanted to work at all. He always told my daughter that your dad has got money, and you go get it. Go get the money.

My wife, that is four years ago today, my wife died, I was married 38 years. My wife gave them all kinds of money. We wanted to have the divorce and Fernando, Sr., was always threatening my daughter. He broke her arms. He did all kinds of physical things to the girl.

Q. Did you ever personally observe this?

A. Yes.

[2316] Q. How many times did you see her with broken arms?

A. Broken arm, once. Marks on her body a lot of times.

Q. How long did the marriage between your daughter, Carol, and Fernando Belmontes Sr., last?

A. About nine years, I think. Nine or ten years.

Q. So Fernando Belmontes would have been about nine or ten years old?

A. Right. We had to go and plead his father when that fella was a little boy to take him out and take him places. He always had a hatchet over my wife's head and my head that we couldn't take him no place unless we gave him money or contributed to the home and this and that. I even bought a home for them.

Q. When was that?

A. I bought a home for them because they had no place to live and I thought that they would settle down and make a marriage. And he didn't. He never paid no rent. Never had no sense of responsibility or anything. Nothing.

Q. After he and your daughter were divorced, did she have another man in her life?

A. After she was divorced?

Q. Yes.

A. Yes, she married again.

Q. How long did that marriage last?

A. I think about three years.

Q. And how old would Fernando Belmontes Jr., had been when the second marriage broke up?

A. He was probably around 13, 14 years old.

[2317] Q. Between his – between Fernando Belmontes' Jr's., birth and his age of 13 or so, how would you describe your relationship with him?

A. Very close.

Q. What sort of things did you and your grandson do?

A. Well, we always was in contact with one another and stuff like that. And try to give him everything I possibly could. My wife resented the marriage from the time that they got married, and there –

Q. Why did she resent it?

A. Well, because the beatings my daughter and everything took and the house life they lived.

Q. How many children were there in the house?

A. In their –

Q. Yes, in their family.

A. Three.

Q. Who was the oldest?

A. Fernie.

Q. Fernie Belmontes?

A. Junior.

Q. Okay. And how many other children were there?

A. Well, there was a baby that died.

Q. How old was that baby when it died?

A. It was one year old. I buried the baby. And then there was Larry and then there was Shelley.

Q. And Larry and Shelley are now teenagers?

A. Yes.

Q. Okay. After Mr. Belmontes became a teenager and the [2318] second marriage broke up, did you have much contact with him at that point?

A. Well, really I didn't have too much contact with him. I was over his house one day and me and my wife, we stopped over and there was some kids over there on the lawn with cars and everything, and I told Fernie, I says Fernie, I says, what are all these kids doing around here?

Oh, it is all kids that I know and stuff like that. And I told Fernie, I says, Fernie, if you ever need anything come and see me, talk to me. And for some reason or another, I don't know why, he didn't do it.

Q. Are you aware that in 1979 he was sent to the youth authority?

A. Yes, sir.

Q. And was your wife still alive at that time?

A. Yes. Oh, I'm sorry, '79?

Q. Yes.

A. No, my wife passed away in '78.

Q. And after he was released, did you have any contact with him at that time?

A. No, I didn't. He was to my wife's funeral.

Q. Pardon me?

A. He was to my wife's funeral. It was four years today.

Q. He was at your wife's funeral?

A. Yes.

Q. Did he have a relationship with your wife?

A. Yes. My wife and him were very close.

Q. Did she die in any unusual way?

[2319] A. My wife –

MR. SUEYRES: I'll object to that. I don't see the relevance of that.

THE COURT: Overruled. You can answer the question.

THE WITNESS: My wife had an accident and she drowned in the swimming pool at home.

MR. SCHICK: Q. Was she in the hospital for a while?

A. The accident happened July the 17th and she was in a coma 'till the 31st. She died the 31st in my arms. I was married 38 years.

Q. Was Mr. Belmontes at the hospital at anytime while she was in a coma?

A. Yes. He came almost everyday.

Q. Have you had – you are aware of the facts of this case, Mr. Salvaggio, that your grandson stands convicted of?

A. Yes.

Q. Have you had an opportunity to recently talk to your grandson?

A. I talked to him about two weeks ago over the phone.

Q. That is the first time you've had contact with him in a few years?

A. Yes. I have another son. My son is in business with me, and from the time the children, I can honestly say it, my son gave his kids everything. And when we have a party or something at the house, a swimming party or something they would always throw their weight around, I got this and [2320] I got that. And when Carol used to bring the kids over, them kids had nothing. Shame to say you have two children and one has something and the

other one hasn't got nothing. And I always thought that they – they disliked them and I always used to tell the kids, don't throw your weight around. Your kids got something and Carol got nothing. She had no means of support.

I'm 64 years old. I've never been in no trouble. Never been arrested, and I was married 38 years. But Carol, my daughter, she ran away and got married.

I can go back, if you want me to. It will only take a minute. I can tell you something that I think this whole thing with my daughter might happened.

I moved here in 1957, came from a good home. I was always able to take care of my children and give them the best of everything. We was here a short time and my daughter was influenced by a couple of girls, a couple of Mexican girls. I came home and she had her suitcases packed. And I said, "Carol," I says, "what are you doing?"

She says, "I'm going to leave home. I'm going with the girls."

I says, "For what?" Just wanted to leave home.

So I gave her a spanking, which I think she deserved. Next day we was called into the police station, me and my wife in Ontario. They told me and my wife that we could not hit our children no matter what they done.

Q. What happened after that?

A. My daughter thought she was ten feet tall. We [2321] couldn't do nothing. She wanted a car and I says she was too young. She ran away and found Fernie's dad as a obsession. He was letting her drive the car and everything.

They ran away. They got married against our better judgment. The stories – I won't take up the Court's time because probably they wouldn't believe it, but my daughter was really a victim of a lot of circumstances same way as that boy I believe is, too, a victim of circumstances.

MR. SCHICK: I have no further questions.

THE COURT: Mr. Sueyres.

MR. SUEYRES: I don't have any questions, Your Honor.

THE COURT: Thank you. You okay?

THE WITNESS: Yeah.

THE COURT: You can be excused to go outside.

MR. SCHICK: Do you think he might remain?

THE COURT: I think so. If you wish to remain in the courtroom you may do so, Mr. Salvaggio.

MR. SCHICK: Next witness will be Carol Belmontes.

THE COURT: Carol Belmontes, please.

[2322] THE COURT: Mrs. Belmontes, come right up this way, if you will, please. Come right over here this way and raise your right hand and the clerk will swear you in.

CAROL BELMONTES,

called as a witness for and on behalf of the defendant, having been sworn, testified as follows:

THE COURT: Right up here, please. Would you give us your full name, please.

THE WITNESS: Carol Belmontes.

THE COURT: You have to speak up, Mrs. Belmontes.

THE WITNESS: Carol Belmontes.

THE COURT: All these people want to hear what you have to say.

This might be a little bit difficult. If you want to take a recess, well do so, okay?

THE WITNESS: Thank you.

THE COURT: The bailiff will get you a glass of water in the event that you need it.

You may proceed, Mr. Schick.

DIRECT EXAMINATION

BY MR. SCHICK: Q. What is your current residence address, Mrs. Belmontes?

A. 753 West Citrus, Colton, California.

Q. That's in Southern California?

[2323] A. Yes.

Q. How long have you lived in that area?

A. In the Colton area itself?

Q. Southern California area.

A. Oh. Since 1957.

Q. That's been in the general San Bernardino County area?

A. Um-hmm (affirmative).

Q. You're the mother to this young man sitting to my side?

A. Yes, I am.

Q. What is the date of Fernando's birth?

A. April the 10th, 1961.

Q. How long had you been married to his father when Fernando Belmontes, Jr. was born?

A. Approximately 11 months.

Q. And where were the two of you living at that time?

A. In Upland.

Q. How long did you remain married to Fernando Belmontes, Sr.?

A. Eleven and a half years.

Q. Now, was Mr. Belmontes of a different ethnic or racial background from you?

A. Yes, he was.

Q. What was his background?

A. He was Mexican-American.

Q. What about yourself?

A. I'm Italian.

Q. Was this marriage something your parents agreed to?

A. Agreed to?

[2324] Q. Yes.

A. No, sir.

Q. How old were you when you got married?

A. 16.

Q. Where did you get married?

A. In Las Vegas.

Q. Were you supported by your husband after your marriage?

A. No, not really.

Q. Did you and your husband have a happy life together?

A. No, sir.

Q. What about your son, you had been married 11 months when he was born?

A. (Affirmative nod)

Q. Have you had any other children?

A. Yes, I have four.

Q. How many of them are living?

A. Three. One daughter died.

Q. Could you describe for the jury the circumstances of the 10 years or so you spent with Mr. Belmontes, Sr.?

A. Rough.

Q. In what way?

A. He wouldn't ever work.

He was a drinker. He was an alcoholic.

Very violent person. I mean he used to beat me.

Q. What sort of beatings?

A. He broke my arm, he stabbed me. Just general beatings.

Q. How was your relationship with your son, Fernie, when you and Mr. Belmontes, Sr. were together?

[2325] A. My son and I have always had a very close relationship.

Q. What about his relationship with his father?

A. The children weren't happy. The only way I can say it is after I left their father, the children really didn't want much to do with him.

Q. What about before you left him?

A. It was always me that they came to. They couldn't go to him. Ninety-five percent of the time he was drunk.

Q. After you and Mr. Belmontes, Sr. were no longer together, did you remarry?

A. Yes, I did.

Q. And for how long did that marriage last?

A. Five years.

Q. How old was Fernie when the second marriage broke up?

A. Approximately 10.

Q. And you were the sole parent at that time?

A. Pardon?

Q. You were the sole parent at that time?

A. Sole parent?

Q. Yes, in the house.

A. No. Me and their stepfather.

Q. After the stepfather and you divorced, how old was Fernie then?

A. Approximately 15, 15 and a half years old. Then I was alone.

Q. Did you have any problems with your son after that point in time?

A. Not any problems, really, other than he – his [2326] stepfather was very, very strict, and Fernie wanted to go out and, you know, go with his friends and stuff. And it was just a little bit hard, you know, to make him come in the hours that he had been used to coming in. There was no man in the home. He was just a little bit hard, in that respect, to control.

Q. After Fernie was sent to the Youth Authority in 1979, did he come back to live with you thereafter?

A. No, he didn't.

Q. Okay. And did you have much contact with him at that point in time?

A. We always kept in contact, always by phone. We talked to each other all the time.

Q. You had regular contact while he was in the institution?

A. I visited him all the time, every weekend.

Q. How old are your other children at this time?

A. I have a son 20 and I have a daughter 15 and a half.

Q. How did your oldest son, Fernie, relate to your other children?

A. Just fine.

Q. Are they close?

A. Very close with his sister.

Q. This is the 15-year-old?

A. (Affirmative nod)

Q. Has she had contact with him since he's been incarcerated?

A. You mean now?

[2327] Q. Yes.

A. She talks to him on the phone every time he calls, she writes to him all the time.

Q. All right. And what about your son, have he and Fernie had contact?

A. Well, my other son doesn't live at home with me. He's on his own.

He does talk to him, like if he's visiting.

Q. So your daughter is the only one left at home then?

A. Yes.

Q. How would you view your relationship now with your son Fernie?

A. My relationship?

Q. Um – hmm (affirmative).

A. Same as its always been.

Q. What kind of qualities can you recommend to this jury as they consider his faith?

A. I don't believe that he should go to the gas chamber.

Q. Just because you're his mother?

A. No. I don't believe he did it.

Q. Are you aware of the facts of this case?

A. (Affirmative nod)

I know my son.

MR. SCHICK: I have no more questions.

THE COURT: Mr. Sueyres.

MR. SUEYRES: I have no questions.

THE COURT: All right. Thank you.

MR. SCHICK: May she remain in the courtroom, [2328] Judge?

THE COURT: Yes, she may.

MR. SCHICK: My next witness would be Robert Martinez.

THE COURT: Robert Martinez, please.

Mr. Martinez, come up this way, if you will. Come right through the swinging gate.

Raise your right hand, please, the clerk will swear you in.

ROBERT JOHN MARTINEZ,

called as a witness for and on behalf of the defendant, having been sworn, testified as follows:

THE CLERK: Thank you.

THE COURT: Right up here, please.

Would you give us your full name for the record, please.

THE WITNESS: Robert John Martinez.

THE COURT: Spell your last for me, please.

THE WITNESS: M-a-r-t-i-n-e-z.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mr. Martinez, what is your current residence address?

A. 123 North Miramonte in Ontario, California.

Q. How long have you lived there?

A. I'd say a good seven, eight years.

[2329] Q. How old are you?

A. 24.

Q. Are you currently employed?

A. Ontario Daily Report. It's a newspaper company.

Q. What sort of work do you do there?

A. I'm a distribution supervisor.

Q. How many years have you worked for the newspaper?

A. Seven years.

Q. You're at that position now after those number of years?

A. Yes.

Q. Do you know Fernando Belmontes, Jr., seated to my right?

A. Yes, I sure do. I've known him for about six, seven years.

Q. When did you first get to know him? Were you in school?

A. Yeah, it was in school.

Q. You were both in school together?

A. Yeah, we went to school together. I met him at a girl friend's house. That's when I first met my wife.

Q. How long have you been married?

A. Since '77. Five years.

Q. Do you have family?

A. Yeah, I have three kids.

Q. Was Mr. Belmontes involved in your wedding in any way?

A. Yeah, he was my best man.

Q. And have you and he ever worked together?

[2330] A. He worked there before, but that's before I took over the distribution department.

Q. At the newspaper?

A. Yeah, at the newspaper.

Q. When you knew about Mr. Belmontes, I take it it was in a social capacity; you were friends?

A. Yes, we were friends.

Q. And this was growing up together down in the Ontario area?

A. Yes. We hung around a lot.

Q. What sort of activities did you and he involve yourself in?

A. I used to have a Monte Carlo, a low rider. We used to work on it together.

We used to go riding around a lot.

Q. How many years did you and Mr. Belmontes hang out together before you got married?

A. A good four – four years.

Q. You did a lot of things together?

A. Yeah.

Q. Was he a close friend or just an acquaintance?

A. He was a real close friend.

Q. How often did you do things together?

A. We were together practically every day.

Q. When you got married, did you have much contact with him?

A. About a year after, and that was it. We would call each other occasionally.

[2331] Q. You've been married for about five years now?

A. Yes.

Q. Has he ever been of any assistance to you and your wife in your marriage?

A. Well, when I had problems with her, I would go talk to him. Somebody to talk to.

Q. And you're aware that Mr. Belmontes did some time in the Youth Authority?

A. Yes, I am.

Q. Did you have any contact with him after he came out of the Youth Authority?

A. He stopped by one time and he visited with us. He called me up on the telephone and told me that he was coming out.

Q. And that was about when; do you remember?

A. I would say about a year and a half ago, a year.

Q. That was the last time you had any contact with him?

A. That was the last time I had any contact with him.

Q. Overall, about how long a period of time then did you know him?

A. About eight years overall.

Q. Okay. Even after you were married, you and he did things together?

A. About a year after, yeah, we still hung around a lot together.

Q. How would you describe Mr. Belmontes as a friend?

A. I wouldn't describe him as a violent person.

Q. What sort of things did you do other than just riding [2332] around and going to social activities together?

A. We smoked marijuana occasionally and we drank beer, hung around the car club.

Q. That's about it?

A. Yep.

MR. SUEYRES: Your Honor, may I have the court reporter mark the transcript, please?

THE COURT: All right.

MR. SUEYRES: Thank you.

MR. SCHICK: Q. Was this on a once-a-week basis, or how often?

A. Well, we would get together at least three times a week.

MR. SCHICK: I have no further questions.

THE COURT: Mr. Sueyres.

MR. SUEYRES: Your Honor, I have a matter that I'd like to take up with the Court outside of the presence of the jury. We can try to do it at the bench, but I'd like it reported.

THE COURT: We'll take a short recess, ladies and gentlemen, while we go into chambers. We'll be with you in just a second.

[2333] You may step down, Mr. Martinez,

(The following proceedings were had in chambers:)

THE COURT: We are now presently in chambers with counsel. The defendant is present.

Mr. Sueyres.

MR. SUEYRES: Your Honor, I didn't want to say anything in front of the jury, obviously, but Mr. Schick asked a direct question concerning the defendant's character and elicited the response from the witness that Mr. Belmontes was not a violent person.

Obviously, Your Honor, counsel was well aware of all the witnesses I have lined up to testify to the contrary. And it may be that counsel just inadvertently slipped. So I'd suggest – I'd like to make a motion to strike and that the Court admonish the jury to disregard that question and answer of the witness. Otherwise, I intend to cross-examine him fully about his knowledge of other violent actions done by Mr. Belmontes.

He was arrested for 148 as a young man, tried to take the police officer's weapon away from him.

When he was 15 years old he carried a .38 revolver to school because he was having trouble.

He's been a member of the Black Angels gang in Ontario, California.

As well as his killing of Jerry Howard, which we've talked about at length.

I mean I'm entitled to question the basis of this [2334] young man's opinion that he's not a violent person, and I intend to do so fully and completely unless we erase it, so to speak, from the proceedings.

MR. SCHICK: I have no quarrel with that.

THE COURT: I'm going to have to allow him to go into the whole background if we don't do that.

MR. SCHICK: I have no quarrel with it.

THE COURT: All right.

MR. SCHICK: You can simply say that he doesn't have sufficient knowledge to make such an opinion, lack of personal knowledge.

THE COURT: The motion to strike is hereby granted and I will admonish the jury.

Thank you.

[2335] (Whereupon court reconvened in open court and the following proceedings were had:)

THE COURT: The record will reflect the jury is all present and accounted for. Defendant is present.

Ladies and gentlemen, I wish to at this point in time admonish you that Mr. Martinez' opinion that Mr. Belmontes is a nonviolent person is not to be taken into consideration by you at all. Court has made the determination Mr. Martinez does not have sufficient knowledge of Mr. Belmontes' background to make that determination and you are not to take it into consideration as to his opinion in your deliberations.

Mr. Schick, you have more questions?

MR. SCHICK: I don't believe I had any more questions. I don't believe – if Mr. Sueyres wished to cross-examine him –

MR. SUEYRES: I'd like to ask him one or two.

THE COURT: All right. Mr. Martinez, would you come back, please.

CROSS-EXAMINATION

BY MR. SUEYRES: Q. Mr. Martinez, at about what age was it that you met the defendant?

A. About 16. I was 16.

Q. You were 16?

Was he about the same age?

A. He was about 13.

Q. And at about what age was it that you stopped seeing [2336] him?

A. Nineteen, 20.

Q. Yours or his?

A. Mine.

Q. Okay. So he would have been about 16 or 17?

A. Maybe older.

Q. Thereabouts?

A. I'd say closer to 18.

Q. Okay. Well, in that amount of time that you did know him, I suppose it is fair to say he had other friends?

A. Well, we kind of stuck real close together.

Q. Were there things that he did when you weren't present? In other words, at times you would be apart, obviously?

A. Yes.

Q. Did you make any attempt to keep track of him?

A. Oh, we would talk a lot, yeah.

Q. All right. But in terms of what he did when you weren't around.

A. He would come over and talk to me and tell me his personal problems, like his girlfriends.

Q. I guess what I'm asking and it is so obvious that it is difficult to see, is that you weren't a detective or a parent or some kind of investigator. You weren't following him around to see what he was up to when you weren't there?

A. No.

Q. Then I take it that you had a bond of friendship there?

A. Yes.

Q. You had some regard for him and he for you?

[2337] A. Yes.

Q. And as a matter of fact, that is why you are here today is because he needs somebody to speak on his behalf, is that right?

A. Yes.

Q. Then I take it at some point when he was young you went your separate ways?

A. Well, he was older, not really young.

Q. All right. At some point you became employed and were working steady with the newspaper?

A. I was working steady with the newspaper even when I met him.

Q. All right. But you lost track of him or – even though you considered yourself a friend you didn't see him on a regular basis?

A. Well, when he went to YTS, after that that is when we kind of split apart.

MR. SUEYRES: All right. Thank you. I have no further questions.

THE COURT: Mr. Schick, anything further?

MR. SCHICK: Nothing further.

THE COURT: Thank you, Mr. Martinez. You may step down.

MR. SCHICK: Darlene Martinez.

THE COURT: You may stay, Mr. Martinez, if you wish.

Mrs. Martinez, come up this way if you will, please. Come over by the court reporter, please. We'd ask you stop [2338] right there and raise your right hand. The clerk will swear you in.

DARLENE MARTINEZ,

called on behalf of the Defendant, having been sworn, testified as follows:

THE COURT: Right up here if you will, please.

Would you give us your full name, please?

THE WITNESS: Darlene Carol Martinez, M-a-r-t-i-n-e-z.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Miss or Mrs. Martinez?

A. Mrs.

Q. You are married to Robert Martinez?

A. Yes, I am.

Q. Who just testified?

A. Yes.

Q. How long have you and Robert been married?

A. Five years.

Q. And do you know Fernando Belmontes, Jr., young man seated to my right?

A. Yes, I do.

Q. How long have you known him?

A. Six or seven years.

Q. And did you meet him first or your husband first?

[2339] A. To the best of my knowledge, I met my husband first.

Q. Okay. And you got to know Fernie through Robert?

A. Yes,

Q. And have you been close friends or just acquaintances over the years?

A. Close friends.

Q. Okay. Is your husband a closer friend than you?

A. Yes, he is.

Q. Did you ever do things together with Fernie?

A. With my husband – I mean, no just me and Fernie. With my husband and Fernie and I, yes.

Q. Did you have any contact with Fernie after he was released from the youth authority?

A. Yes, I did.

Q. Do you remember anything about that contact?

A. Yes, When he first got out he called us and I had talked to him on the phone approximately a half hour to an hour.

Q. Did you get together and meet with him?

A. Yes, he came to our house.

Q. Did anything happen at that meeting that you recall?

A. Yes. He told me that he had accepted the Lord and he was a born – again Christian.

Q. Did that have any special meaning to you?

A. Yes, it does.

Q. Why is that?

A. Because I'm a born – again Christian, too, and when I saw him I just – he came in and he hugged me and I hugged [2340] him and it was just – there was just a softness in him, a peacefullness.

Q. Is this different than what you had seen before?

A. Yes.

Q. Is that the last time you saw him prior to today?

A. Yes, it is.

MR. SCHICK: I have no further questions.

THE COURT: Mr. Sueyres.

CROSS-EXAMINATION

BY MR. SUEYRES: Q. That would have been in approximately September or October of 1980 that he contacted you?

A. Yes.

Q. Did he talk about what he – where he was living at that time?

A. I can't remember where he was living.

Q. When you saw him, was that in Southern California?

A. Yes, it was.

Q. Did he talk to you about having lived in a halfway house in Oakland?

A. Yes.

Q. Tell you that he had only lived there a week or two? Did he mention that to you?

A. I can't remember.

Q. Are you also acquainted with Barbara Murillo?

A. I've met her once or twice.

Q. All right. Were you aware that Mr. Belmontes was [2341] living with Barbara Murillo started about the end of 1980 and the first part of 1981?

A. Yes.

Q. All right. So that would have been after he talked to you?

A. Yes.

Q. All right. You also knew the defendant or Mr. Belmontes in 1979, obviously.

A. Yes.

Q. All right, Did he talk to you then about how he had accepted the Lord?

A. No.

Q. Did he explain to you then that he was attending a particular church then?

A. No. The first time I heard about he was into some church is when he had contacted me – us after he had just got out.

MR. SUEYRES: Excuse me just a moment.

Q. Were you aware that in 1979 that he was attending Soldiers For Christ Church several times a week?

A. No, I wasn't.

Q. All right. This would have been about the same time as that or shortly before he got in trouble in 1979 and had to go to the youth authority.

A. No.

Q. All right. Since that time in September or October of 1980, have you ever talked to him about his religious conversion or preference?

[2342] A. We have had no communications since then.

MR. SUEYRES: Thank you. I have no further questions.

THE COURT: Mr. Schick?

REDIRECT EXAMINATION

BY MR. SCHICK: Q. Mrs. Martinez, you indicated you were aware Barbara Murillo was going to be living with Mr. Belmontes?

A. Yes.

Q. Did that cause you any concern?

A. Yes. Me and Fernie, as I said when we talked on the phone he was concerned because she wasn't a Christian and the struggle he would have to – well, he would be going through.

Q. Did you have any personal acquaintance with that struggle?

A. Yes.

Q. How so?

A. With my husband. He is not a Christian. It is very difficult.

Q. Did you talk to Fernie about that?

A. Yes, we did.

Q. What did you tell him?

A. Just that I was in the same – I was in the same boat, and it was – it was very hard and that he would have, you know, trials and he would just have to pray for her.

MR. SCHICK: Nothing further.

[2343] THE COURT: Mr. Sueyres, anything further?

MR. SUEYRES: No.

THE COURT: Thank you, Mrs. Martinez. Thank you very much.

MR. SCHICK: Call Mr. Belmontes.

THE COURT: Mr. Belmontes, come forward, please.

She may remain in the courtroom?

THE COURT: She may, yes.

Raise your right hand, please.

FERNANDO BELMONTES, JR.,

the Defendant herein, having been sworn, testified as follows:

THE COURT: Right up here, please.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mr. Belmontes, you've heard testimony this afternoon from your grandfather and your mother about certain incidents in your childhood, have you not?

A. Yes.

Q. What can you tell the jury about how those incidents affect what's happened here?

A. I can't really say how I was affected right now. I can't use it as a crutch to say I am in a situation right now, I'm here now because of that. But as I look back at it now it was pretty hard.

[2344] Q. What is some of your earliest memories of your childhood with your father, Fernando Belmontes, Sr., and your mother?

A. I remember that he used to hit her a lot, come home drunk. I always knew that he, my grandfather, was always trying to help us out because my father wouldn't do nothing.

Q. Did you attend school regularly growing up?

A. I had some problems when I was in earlier grade school. I would take my little brother to school and I'd take off from school myself.

Q. Why did you do that?

A. I didn't like school. Couldn't understand it.

Q. Did you attend school regularly through high school?

A. No.

Q. When did you stop attending school?

A. In the 9th grade.

Q. Is there any particular reason for that?

A. Not really. I just didn't feel it was doing anything for me. I wanted to get a job or something, help out my mother. She was by herself.

Q. When you stopped going to school your father had left the home?

A. Yes, he was gone.

Q. What about your step-father?

A. He wasn't there.

Q. Okay. How would you describe your relationship with your father?

A. Not too good. He is my father. He has his problems. [2345] He had a lot of problems. I didn't associate with him too much. I didn't like him drinking. I didn't like him around me while he was drunk or drinking. He just had his problems and he wouldn't take care of him himself. He wouldn't do nothing for himself to better his life. He liked the way he was. I didn't. So if he was going to be like that, you know, I didn't want him around me.

Q. Have you seen – your father died recently, did he not?

A. Yes.

Q. When was that?

A. January 30th.

Q. Of this year?

A. Yes.

Q. While you were in custody?

A. Yes.

Q. Did you see your father before he died after you were arrested?

A. I seen him one time when I had barely gotten out of YA.

Q. That would have been back in 1980?

A. It was in the beginning part of November.

Q. Of 1980?

A. Yes.

[2346] MR. SCHICK: Q. And did he have regular contact with you after your mother and he separated and divorced?

A. He used to come and visit us. He had visitation rights. He would take us out on Sundays for the day. A lot of times we didn't go with him. When there was nothing else to do, we would go with him. That's about it.

Q. And did you involve yourself quite a bit with your mother during that time period?

A. Yes. I wanted to help her out. I thought I could help her out. I was too young.

Q. How would you describe your relationship with your grandfather?

A. As of right now?

Q. As you look back upon it growing up.

A. While he was growing up, we were close. He was always there to help us. He was always there when my mom needed help, when things weren't going right with her and my father.

As I started growing up, I started going into my own thing, kind of shied away, strayed away from him. I kept in contact with him a few times. I was there when my grandmother was in the hospital.

Q. Now, you were sent to the Youth Authority in 1979?

A. Yes.

Q. And where exactly did you get sent?

A. When I got committed?

Q. Um-hmm (affirmative).

[2347] A. To YTS, Youth Training School in Ontario.

Q. From there where did you go?

A. To a camp, Pine Grove.

Q. Where is Pine Grove located?

A. About 11 miles above Jackson, California.

Q. What sort of facility is Pine Grove?

A. It's a fire camp.

Q. Do the wards there do anything special?

A. It's a minimum security part of Y.A.

You fight fires during fire season.

You go out daily working on crew.

It's just a minimum security youth authority.

Q. When did you get sent there?

A. October 24th, 1979.

Q. When were you released from Pine Grove?

A. October 14th of 1980.

Q. So you were there just about a year?

A. Yes.

Q. And most of your time there was spent fighting fires and doing other work?

A. Yes.

Q. How many people were there at that facility?

A. That facility? The maximum was about 85.

Q. How many on your particular crew?

A. The maximum of the crew would be 21, but at different times there was between 13 and 21 on the crew.

Q. Was that crew rated in any way by the supervisors or counselors?

[2348] A. Yes, depending upon your work, your program there.

Q. Is that rated like from one to 20, or whatever the number was on the program?

A. Yeah. Well, like number one man, they have more responsibility on the crew. Number two man, and then so on down the line. After about number three man there's no responsibility; just a regular crew member.

Q. You got there in October of 1979?

A. Yes.

Q. What was your ranking at that time?

A. Last man.

Q. How long did you stay there?

A. Approximately five months.

Q. Did other people pass you up?

A. Yes.

Q. And you stayed last man?

A. Yes.

Q. Did anything happen during the course of that year –

A. Pardon me?

Q. Did anything happen during the course of that year to change your performance?

A. At first I was just doing a regular program.

Then they have this program called M-2 sponsors. It's a Christian program. Members of a church in Pine Grove, the Pine Grove Community Church, are the sponsors. You're matched up with a family and you're allowed to go out of camp with them, spend time with them.

Q. What sort of time?

[2349] A. The whole weekend. Like on Saturdays it was from – you could go – they could pick you up from twelve o'clock until 9:30 in the evening.

On Sundays, from 7:30 in the morning until 9:30 in the evening.

On weeknights it was from 4:30 until 9:30.

Q. Did you have any particular people you were paired up with?

A. Yes, I did.

Q. Who was that?

A. Bev and Fred Haro.

Q. Husband and wife?

A. Yes.

Q. What about the family, did the Haros have a family as well?

A. They have a son, a younger son, about 17; and two daughters, which are both married.

Q. Who all was living in the household?

A. Just Bev and Fred and their son.

Q. Was there any person who was a contact between the program and the institution where you were?

A. Pardon me?

Q. Was there any person who was a contact between the two, who went in the institution and set up the M-2 program?

A. Yes, the pastor of the church.

Q. Who was that?

A. Dale Barrett.

Q. Did you meet anybody else who was coordinating that [2350] program?

A. Don Miller.

Q. What was Mr. Miller's responsibility?

A. At the time he was just a sponsor for one of the wards in the institution.

Then he started – he became an ordained minister and started his own little branch of the M-2 sponsors.

Q. What sort of things did you do with the Haro family?

A. Everything. Go to the house, take me places to meet their relatives, all kinds of things.

Q. Did you get to know people in the church?

A. Yes.

Q. How big a church was it?

A. It was a big church.

Q. For how long did you keep contact with Bev and Fred Haro?

A. While I was in or this whole time?

Q. The whole time.

A. Since December 24th of '79 is when we were matched up, when they became my sponsors, until today.

Q. Why did you get involved in that program?

A. At first for a way to get out of camp. I didn't like the idea of being locked up. I thought it was just an escape to get out of camp and get away from everybody else.

Then I started seeing how Bev and Fred treated me. I couldn't realize or understand why people could feel that way about someone they really don't know. I got curious. I just started liking the way they lived, their outlook on [2351] life, their attitude, the way they felt towards everything.

I've tried everything else in my life and it never ever really worked out for me.

I started reading the Bible, studying the Bible with them.

They would help me along, show me things I did wrong or things I should be doing right.

In time I started serving the Lord while I was in.

Q. What happened after you got out?

A. I was released, and Don Miller set up this – before I could get paroled, he made arrangements with this parole house in Oakland, Exodus Brothers, a prison

ministry, a halfway house. He arranged for me to go there and be paroled to the house.

Q. Is that where you were paroled?

A. Yes.

Q. How long did you stay there?

A. Approximately two weeks, two and a half weeks.

Q. Now, when you were sent there what did you do? Did you have a job?

A. I had got a job the very next day at the Home of Peace, which is a – it's a missionary home. People from all over the world stay there while they're in the United States. They have like a little warehouse on the side where they box and crate the furniture and barrel the furniture or clothes and take the stuff to the docks to be shipped to wherever they're going.

Q. You worked there?

[2352] A. Yes, I did.

Q. How long did you stay working there?

A. About two and a half weeks.

Q. Why did you leave?

A. The home?

Q. Yeah.

A. When I got there, I really enjoyed it, it was nice, the fellowship with everybody. They mostly were ex-convicts just starting over a whole new life on the streets

again. I enjoyed it there. But as I started getting my paychecks and everything, they started more or less requesting that I pay all the bills that were there since I was the only one working.

Q. How many people were in the house?

A. Three.

Q. Three people?

A. Yes, three, and then one more was staying there on and off.

Q. Where was Barbara Murillo at this time?

A. In Southern California.

Q. Had you had any contact with her or from her after you were released?

A. Yes.

Q. Was she receiving any money from you?

A. No. I was saving it up so when we did get together we could get an apartment together.

Q. When you left the program there, where did you go?

A. Back to Southern California.

[2353] Q. And who did you see down there?

A. Barbara, my daughter, Barbara's mother, my parents.

Q. Had you seen your daughter before?

A. Before this?

Q. Um-hmm (affirmative).

A. I seen her when she was first born, while I was in YTS. Then I got moved to the camp, and I seen her one time.

Q. Did you and Barbara make any plans when you got together down in Southern California?

A. I planned on taking a job with the federal government that I had been offered while I was in camp.

Q. What was that job?

A. Federal government, forestry.

Q. The same work you had been doing while you were at Pine Grove?

A. Yes.

I planned on coming back up. We planned on getting an apartment. Her mother said she would bring us to Lodi and help us get an apartment together here, and then I would go back to Oakland and get my board plans changed to here.

[2354] MR. SCHICK: Q. Now, did you ever live in Lodi before?

A. No.

Q. Why did you select Lodi?

A. Close to Bev and Fred, to the church and to where I would be working. Away from everybody else, my neighborhood.

Q. Your neighborhood where?

A. In Ontario.

Q. And you and Barbara then got a place?

A. Yes.

Q. Where was that place? What was the address?

A. Address? 416 East Locust.

Q. Okay. Was that near Bob Bolanos?

A. Across the street.

Q. That is how you met him?

A. Yes.

Q. Was it an apartment house that the two of you lived?

A. Yes.

Q. When did you first meet Bolanos?

A. I can't really remember. About –

Q. When did you and Barbara first move to Lodi?

A. Well, she got up here December 23rd.

Q. Of what year?

A. '81.

Q. '80 or '81?

A. '80. Yeah, '80.

Q. And is there any particular reason why you had been [2355] offered that job?

A. Because of my – the way I worked while I was in camp.

Q. You said you were bottom of the class for a while. Where did you end up when you were released?

A. Number two man.

Q. How long did it take you to work from the bottom to the number two position?

A. Not very long when I started acting right, straightened my head out.

Q. So you and Barbara then were living together at the apartment?

A. Yes.

Q. And what about your religious commitment that you had made? What happened when you and Barbara were living together?

A. Things just didn't go my way. I couldn't deal with it. I just started having problems. Started going back to my old ways.

Q. Do you still spend any time reading the Bible?

A. Yes.

Q. I don't see you bringing it to court or whatever.

A. I read the Bible. Right now I don't feel it would be right. I don't want to be a hypocrite.

Q. What do you mean by that?

A. I tried it before. It worked. It was a beautiful life and everything. I couldn't deal with it. I couldn't dedicate

myself fully when I got out. A lot of different pressure on the streets than on the outside. I feel I got [2356] arrested and got involved in this without him or without walking that life so I'm got going to use it as a crutch to get myself out of it.

Q. Are you saying you've given up your belief?

A. No, I haven't given up. I just don't feel right saying that I'm dedicated one hundred percent, because I'm not. I still read the Bible and I believe in the ways. I just don't feel it is right right now.

Q. When would it be right?

A. Pardon me?

Q. When would it be right?

A. Whenever I could rededicate myself fully to it, to the life.

Q. What would it take to do that?

A. Just give up everything I'm involved in. Just my ways of life right now, which are different than the ways that the Bible says you should live.

Q. Has your belief in anyway helped you through this experience of being put on trial?

A. This trial right now?

Q. Uh-huh. (Affirmative)

A. How do you mean?

Q. Has it been of any help to you?

A. Yeah. Well, I feel I can deal with it. I feel more, you know, more at ease.

Q. Why?

A. Because I know what is going to happen. I know what happened in this crime. The judgment here doesn't really [2357] affect me. Doesn't mean nothing to me.

Q. Why is that?

A. Why should it? This is only my life, I mean, you know, they can mess with my life or take my life if they want here on earth, but I still believe when judgment day comes and I do go before the Lord he knows what happened in this crime and I believe I'll get a fair judgment then. So I'm not worried about this one right here.

Q. Do you feel that you can contribute to society in anyway if you are not put to death?

A. From an institution? From a penitentiary?

Q. Yes, from inside an institution knowing that could be 50 to 60 more years?

A. I don't know. Depends on how you want to present yourself in the penitentiary. There is – it is wrong from the beginning being in a penitentiary, but it is on how, you know, how you live your life in there. You can be –

Q. What do you mean by that?

A. You can be a screw up and mess up a lot or just mind your own business and do your own thing. It depends on your outlook. If you have a goal for yourself that you want to, you know, try to fulfill, then more or less you'll be occupied about that goal instead of out messing around.

Q. Have you thought about any goals you wish to pursue or achieve if you are in prison for the rest of your life?

A. A goal for myself?

Q. Yeah.

A. There isn't really too many being in a penitentiary. [2358] I'd like to get into music.

Q. What sort of music?

A. All kinds.

Q. Have you ever been involved in music before?

A. Yes.

Q. What have you done with your time in the 17 months you have been in the county jail?

A. What have I done with my time?

Q. Yeah.

A. Wait for this. Prepare myself.

Q. Do you have any hobbies?

A. I draw. Make picture frames out of cigarette packs. Sleep. Watch TV. Ain't too much you can do inside.

Q. Do you read at all?

A. Yes, read a lot.

Q. What sort of things do you read?

A. All kinds of novels.

Q. What would you do with the next 50 to 60 years of your life if you were in prison?

A. It is hard to say. Ain't too many opportunities in there, too many things you can do except try to stay alive. I don't know. Just try to stay alive.

Q. What sort of things do you want to do with music?

A. I don't know. I'm not a musician myself, but –

Q. Have you ever been a musician?

A. I've played a few instruments in junior high.

Q. What instruments did you play?

A. Saxophone. Bass, cello, a cello. That is about it.

[2359] Q. And what sort of things do you want to do with music?

A. I really don't know. I'd like to start playing the saxophone again. It all depends on yourself, if you just want to play a saxophone or if you want to really become something with a saxophone. Always an opportunity to reach the outside world through music, poetry, writing books, all kinds of things. That is about it.

Q. Do you want to be given the opportunity to do those things?

A. It would be nice. But like I say, you know, there is not really too much you can do. Being in prison is the same thing, you don't know whether you are going to die or not. You can't say – a man can't be sentenced to 15 to life and say he will be home in ten years. Ain't no telling who is going to walk up behind you and put a knife in your back. Can't really tell. All I can do is live for, you know, each day.

I'm not going to say I'm going to live that 50, 60 years or I won't be gassed, there is really no telling. Just live as long as I can.

Q. Are you asking for the opportunity to be given that chance?

A. Yes.

Q. And prepared to contribute in anyway you can to society if you are put in prison for the rest of your life?

A. If the opportunity is there, yes.

MR. SCHICK: I have no more questions.

THE COURT: Mr. Sueyres?

MR. SUEYRES: Yes. May I have just one [2360] moment, Your Honor?

(Pause)

CROSS-EXAMINATION

BY MR. SUEYRES: Q. Mr. Belmontes, with respect to your Christian conversion, that opportunity in December of 1979 wasn't your first exposure to Christianity?

A. Yes.

Q. Well, do you recall telling Mona Terrell (phonetic), the probation officer in San Bernardino County in March of 1979 when you were being interviewed before your conviction of that felony, but when you were being interviewed about it, that you had found Christ with the Solders of Christ Church?

A. Did I tell her that?

Q. Yes.

A. She had a lot of questions about how I was living my life on the streets at the time. I may have said that. I don't know if I exactly said I found the Lord. I told her I was participating in church services there. A few times the pastor from the church came out and visited me also while I was there.

Q. You told her that a friend had turned on you to Christ.

A. Well, his life was about as bad as mine at the time before he found the Lord or dedicated his life to him. I couldn't see the change in him. He talked me into going to the church.

Q. Now, you are very frank with us that in December of [2361] 1979 when you were in the youth authority you saw the opportunity of going to the Haro household and participating in their church as an opportunity for you to leave the institution?

A. Yes.

Q. In other words, you used religion to get something for yourself, something that religion didn't have to offer but came along with it?

A. What do you mean, I used –

Q. You used religion –

A. Being a Christian.

Q. You told everybody you wanted religion, but what you wanted was an opportunity to get off the grounds.

A. At the beginning, yes.

Q. All right. And when you were released you were set up with a program in Oakland, the Exodus House. That is a religious halfway house, correct?

A. Yes.

Q. And before you could be paroled, you had to talk to the parole board about what your plans were and what you wanted to do, isn't that also true?

A. Yes.

Q. And so part of the plans that you had in mind to do were to pursue this religious experience?

A. True.

Q. And that is part of the reason or at least may have been part of the reason that you were paroled at all at that time?

[2362] A. No. I was paroled because my time was up. They couldn't keep me no more time without putting another beef on me, without charging me with something else. When I got to that camp I had exactly a year to do. They found no reason why I should be kept in the institution.

[2363] MR. SUEYRES: Q. And after you went to Exodus House, you were there two weeks and you were gone?

A. About that, two and a half weeks, somewhere around there.

Q. You went down to Ontario, California, and started living with Barbara?

A. Montclair.

Q. Or Montclair?

A. Yes.

Q. But you gave up the program and just went on down to Southern California?

A. Yeah. Well, I felt the program there wasn't something I could deal with. I didn't feel they were right.

I talked to the people who helped me with getting to this halfway house. I told them about my problem there. They really didn't say nothing about what I should do about it.

I didn't feel it was right, what they were expecting of me, the counselors from that home.

Q. And because you left without permission and because you left, you had to go back to the board and explain what had happened?

A. No, I didn't go back to the board. I went to the superintendent of the parole officers in Oakland.

Q. There was some discussion with persons of authority about what was going to happen now, since you had left when you weren't supposed to?

A. Not really. My parole officer was there, present with [2364] me, while we talked with the supervisor. She stated that she also was to blame for my leaving the area without having permission from the board because she told me when I first got out that I had the right – if I left the home, to leave a phone number and address so she could reach me. But she never told me that I couldn't leave the county.

Q. In essence, you said you thought it was okay for you to leave?

A. As far as I knew, it was, yes.

Q. All right. And you asked for another placement?

A. Another placement? Yes.

Q. Another placement or another chance at some kind of a program.

A. I just asked them if they could put me in another parole house.

Q. All right. That was Allied Fellowship?

A. Yes.

Q. Where was that?

A. In Oakland.

Q. How long did you stay there?

A. When I asked to go – when I went for that meeting with the supervisor and my parole officer, I asked them if I could get permission from the board to go back to Southern California.

They went ahead and placed me in Allied Fellowship until this board thing came back, which would have been about Friday. I was there about three days at the parole house, and the plan came back, and they granted me two more [2365] weeks in Southern California.

Q. And after that you moved to Lodi to live with Barbara?

A. Yes.

Q. You indicate you picked Lodi because it would be close to the Haros?

A. Yes.

Q. Wasn't there another reason for picking Lodi?

A. My job.

Q. And another one yet?

A. Not really.

Q. Wasn't Barbara's mother familiar with the Lodi area?

A. She was planning on moving up there.

Q. She's the one that rented the apartment for you and helped you and Barbara get set up there?

A. Yes.

Q. So it wasn't just religious attraction that brought you to the Lodi area; there were some very practical reasons?

A. Yeah, a good job.

Q. In other words, when you were in the Youth Authority you had been trained – at Pine Grove you had done this kind of fire fighting work and you had an opportunity to continue with it even when you were out?

A. Yes.

Q. It was also very convenient because Barbara's mother was heading up that way and she was going to help you with the very practical matter of setting up your

household, putting up the money to rent the apartment and so forth?

[2366] A. They knew about this job opportunity before I got out.

The foreman of this crew came to me while I was in camp and offered me this job, informed me that I had about maybe about a month and a half, two months before they would be hiring again, and that they were offering me a job.

I told him about my parole plans.

He said if it was possible to come back around here, to – that I would have a job.

Barbara's mother knew about this. She was planning on moving up to Lodi about three or four months after I came to the camp.

Q. You indicated in your direct examination that one of the things you noticed when visiting with the Haros while you were still in the institution was that you couldn't understand how they would treat you that way, treat you as well as they did, apparently, when you were someone that they really didn't know?

A. True.

Q. In other words, if it had been you, you wouldn't have done the same?

A. I really don't know. Never thought about it.

Q. Isn't it a fact, Mr. Belmontes, that you make a very definite distinction in your mind between people you know that are your friends and the rest of the world?

A. Not really.

While I was in jail, while I was in camp, in the Youth Authority, a lot of people feel different about convicts or inmates that are in. A lot of people don't want nothing to [2367] do with a person that's been arrested, ex-convict. As you know, it's kind of hard for an ex-convict to get a job right now, also. A lot of people don't like that.

I couldn't understand why these people or this program would come and take out a person who is arrested, you know, for, you know, what he's arrested for, but he's still incarcerated. But they would come and pick him up, take him out, show him a different way of life, share things with him. I didn't really think people were like that.

My peers are different from your peers, you know. Your people, your friends would be a lot different than mine.

Q. Well, you protect your friends, right?

A. Yeah, Friendship, yes.

Q. If they're not within the circle of your friendship, you don't care about them.

A. You can't trust too many people nowadays. A real friendship is something to really – I feel to cherish. There's not too many people that would really be your friend and be a devoted friend. A lot of people claim to be your friend and stab you in the back. There's a difference between friends and associates or acquaintances.

Q. What about Steacy McConnell?

A. She was an acquaintance.

Q. She was outside that circle, wasn't she?

A. No. She was in it.

Q. Going back for a moment to your religious experience, do you recall being arrested for that crime that ultimately [2368] you were sent to the Youth Authority on?

A. Yes.

Q. And that crime involved your admission to a court that you had in fact possessed the weapon involved?

A. I might have possessed the weapon.

Q. Do you recall – well, you did plead no contest?

A. Yes, I did.

Q. And the Court told you that that's for purposes of the criminal proceedings, an admission of guilt?

A. Yes.

Q. And you were asked if it was in fact true, and you plead guilty – pardon me – no contest, admitting that it was true?

A. Yes.

Q. That you had consealed that weapon, that evidence of a crime?

A. Well, at the time I told him that I might have possessed the weapon. So I just took the no contest.

Q. You heard Mr. Steven Cartwright, correct?

A. Yes.

Q. You had that weapon at that time?

A. Yes.

Q. All right. And when you were arrested, you were arrested by Sergeant John Donaldson of – Jake Donaldson –

A. Yes.

Q. (continuing) – of the Ontario Police Department?

A. Yes.

Q. And he talked to you about the basis for your arrest, [2369] didn't he?

A. Yes.

Q. As a matter of fact, that was the day after you had talked to Steven Cartwright?

A. Yeah.

Q. And he asked you if you had any guns?

MR. SCHICK: Judge, could we approach the bench for a moment?

THE COURT: All right.

(Conversation at bench)

[2370] THE COURT: You may proceed, Mr. Sueyres.

MR. SUEYRES: Q. Do you recall your answer to Mr. Donaldson?

A. Not exactly, no. It's been a while.

Q. You told him that your only weapon was your bible.

A. I don't remember. Like I say, it's been a long time ago.

MR. SUEYRES: Thank you. I have no further questions.

THE COURT: Mr. Schick?

MR. SCHICK: I have no further questions.

THE COURT: Thank you, Mr. Belmontes. We'll take a recess, ladies and gentlemen.

MR. SCHICK: Judge, unfortunately that is the last witness I have today. I didn't think it would take quite this short of time.

THE COURT: All right. We will then recess, ladies and gentlemen, for the evening. Do not discuss the matter with anyone during the course of the evening hours. We might be able to finish tomorrow, at the outside, Friday. I'm advised that Mr. Schick – Mr. Sueyres' wife will be delivering a child on Thursday and he's asked for the day off. So I granted him that pleasure. So hopefully we can finish tomorrow. Please return to the Court at ten o'clock and we'll try to get to it. Thank you.

(Whereupon the jury was excused at 2:58 p.m. and the following proceedings were had out of the presence of the jury:)

[2371] MR. SUEYRES: We had approached the bench before the last question of Mr. Belmontes, and rather than trying to reconstruct it later perhaps we should indicate on the record what that conversation consisted of.

THE COURT: The record should reflect that Mr. Schick had objections to Mr. Sueyres' pursuing the element of Mr. Belmontes' possession of a weapon and the questions with reference to that weapon, and Mr. Sueyres was allowed to pursue the matter without objection on the record by Mr. Schick concerning Mr. Belmontes' religious beliefs, and his response to the police officer when making inquiry as to whether or not Mr. Belmontes had a weapon. Mr. Belmontes' apparent response is my weapon is my bible.

MR. SCHICK: Basis of my objection as stated, Judge, was beyond the scope of direct examination on the record.

THE COURT: Yes. And Mr. Sueyres was allowed to go into it.

MR. SUEYRES: Thank you.

MR. SCHICK: Is it possible – Mr. and Mrs. Martinez are flying back tonight. Is it possible Mr. Belmontes have some sort of a short visitation in view of that fact?

THE COURT: I don't know where we can do that. Difficult security problem.

THE BAILIFF: I think if they go out to the jail they might allow them to visit.

THE COURT: Visit here in the courtroom?

[2372] THE BAILIFF: We'll be leaving in about 30 minutes.

THE COURT: Let them have a ten minute visit in the courtroom. Have all the deputies, they can do it here in the courtroom.

MR. SCHICK: Mother can visit at the jail?

THE BAILIFF: She might.

MR. SCHICK: Judge, could the Court order a visit for the mother and grandfather tonight?

THE COURT: I can order it, but you know what the jail does with my orders.

MR. SCHICK: They will only be here tonight.

THE COURT: We can order it, but they won't abide by it. I have much little power anyway, and none over the jail. We can put it in there.

THE BAILIFF: You want it on the dispo?

THE COURT: Let's put in the disposition sheet that the mother and the grandfather are here from out of town for the purpose of testifying and should be allowed to visit the defendant at the jail.

Mr. Schick, I have been advised by transportation there is a possibility they could confer with them in the holding cell conference room up on the third floor.

THE BAILIFF: All of them, so we will just exclude this then.

THE COURT: Yeah.

(Recess at 3:00 p.m.)

[2373] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	No. 32183
vs.	)	Dept. No. 7
FERNANDO BELMONTES,	)	
Defendant.	)	

The above-entitled matter came on regularly for hearing on Wednesday, August 4, 1982, at the hour of 10:51 a.m., before HON. WILLIAM R. GIFFEN, Judge of the Superior Court of the State of California, for the County of San Joaquin.

REPORTED BY: VICKI MARIE HAUNER, C.S.R. No. 4098 and JOHN SQUIRES, C.S.R. No. 2001

[2374] APPEARANCES OF COUNSEL:

CLARK SUEYRES, Deputy District Attorney, Courthouse, Stockton, California, appeared as counsel for and on behalf of the People.

JOHN SCHICK, Attorney at Law, 2027 Grand Canal Boulevard, Stockton, California, appeared as counsel for and on behalf of the Defendant.

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[2375] THE COURT: Well, it's not 2:30. It's ten to 11:00.

I think some of you sat here. I apologize to you. We have a couple of judges on vacation. The workload has been doubling up.

I also forgot to tell you yesterday, since Judge Dozier is gone, he handles our commitments at the state hospital, and I have been filling in for him on Mondays, Wednesdays and Fridays. Today being Wednesday, I'm going to have to go to the state hospital on the 1:45. That calendar out there usually takes me about 45 minutes to an hour. I anticipate finishing up with that calendar today at approximately a quarter to 3:00, and we will try to reconvene, if we have to, at three o'clock. So I wanted to give you advance notice of that. I apologize to you once again. I spent this last six weeks making more apologies than I ever have in my lifetime.

For the record, the People of the State of California versus Fernando Belmontes, Jr. is called for further jury trial.

The record should reflect the jury is present, the defendant is present. We are now ready to proceed.

Mr. Schick, you may call your next witness.

MR. SCHICK: Reverend Dale Barrett.

THE COURT: Reverend Barrett, please.

Reverend Barrett, would you come right up this way, please, come right through the swinging gate, if you will. Right there is fine, sir. Raise your right hand and the [2376] clerk will swear you in.

DALE BARRETT,

called as a witness for and on behalf of the defendant, having been sworn, testified as follows:

THE COURT: If you'll take the seat right up here, please, sir.

We'd ask that you state your full name for the record.

THE WITNESS: Dale Barrett.

THE COURT: Spell your last for us.

THE WITNESS: B-a-r-r-e-t-t.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. What is your occupation?

A. Minister and chaplain at the California Youth Authority in Pine Grove.

Q. You are an ordained minister?

A. That is correct.

Q. How long have you been an ordained minister?

A. 14 years.

Q. In what faith were you ordained?

A. Evangelical Methodist Church.

Q. You're currently serving a church in the area of Pine Grove?

A. That's correct.

Q. Have you also during the course of your ministry been involved in prison chaplaincy?

[2377] A. Yes, for about 12 and a half years.

Q. In what institutions have you been involved in the course of those years, Reverend Barrett?

A. Mainly in Los Angeles, where I pastored for seven years and had a drug rehabilitation center and a halfway home in county jail situations, local court facilities.

Here presently at Pine Grove facility for about three and a half years.

Q. Okay. And during the course of your ministry have you come to know this young man seated to my right, Fernando Belmontes, Jr.?

A. Yes, I have.

Q. When did you first meet Fernando?

A. It would be hard for me to place the time that he was in our program. We've worked with about a hundred and seventy-five young men. But I would say approximately two years ago.

Q. Is there a particular name you give to this program?

A. The M-2 program.

Q. Were you involved at all in setting up that program?

A. Yes, I did.

Q. Could you explain what the basic function or purpose of the M-2 program is?

A. Yes, I will. M-2 stands for matching two, indicating one from our local church congregation, along with one with the institution.

We have done that with 175 young men.

There are certain freedoms that we have been allowed.

[2378] The M-2 program is contracted by the California Youth Authority to provide this function.

We take them into our homes. We have certain days. A normal family might be involved on a Wednesday night on a church service, on a Saturday all day after they have completed their functions in the camp from noon on, on a Sunday from nine o'clock until nine o'clock in the evening. During the duration of our services in their homes, they would visit and care for them at that time.

Q. Was Mr. Belmontes involved in the M-2 program?

A. Yes.

Q. Do you know the length of time he was involved in that program?

A. About a year.

Q. And did you involve or match him with anybody who belonged to your church?

A. Yes, I did. I matched him.

Q. Who were the people he was matched with?

A. Fred and Beverly Haro.

Q. That's a husband and wife?

A. That's correct.

Q. When did Fernando first get matched with Mr. and Mrs. Haro?

A. Well, there was a provision that they had to be in camp about 30 days. I would guess it was a normal situation. Probably he waited two or three months.

It was my decision, upon getting to know the young man – we hold a church service at the camp every week. I was [2379] down there several times a week. It was my responsibility to get to know the young men, based upon their proclivities, tendencies, interests, with a couple who I thought they might be compatible with in the church.

Q. You, in essence, make the match?

A. Correct.

Q. Did Mr. Belmontes come in contact with you thereafter during that year he was matched with the Haros?

A. Frequently. At least twice a week.

Q. Was this in an official or social capacity that you saw him?

A. Probably both.

Let me list several of the capacities.

He would have seen me as the chaplain at the facility for church services.

Secondly, he would have seen me as the pastor of the church in Pine Grove when he participated with his family.

They were have faithful sponsors. He was there on a very systematic basis.

I even saw him socially in the home of the Haros.

Q. When was your last contact with Mr. Belmontes?

A. It would have been just pursuant to his leaving the facility. I have not seen him since then.

Q. Okay. Was Mr. Belmontes involved in church activities?

A. Yes, to a high degree.

Q. How was he received by the members of the church?

A. Well.

And I would say of our participants in the program, he [2380] was one of the more sociable young men involved in the church.

Q. What sort of activities was he involved in?

A. He was involved in participating in church functions, primarily in attending.

As far as ministry or that sort of thing, that would have been limited by the nature of the program.

We did also participate in his baptism.

Q. Okay. When did his baptism take place?

A. It would have been towards the conclusion of his time with us. I would suppose somewhere along the three quarter mark.

Q. Now, do you baptize everybody who is –

A. No. A very small percentage.

Q. Who makes the decision about whether or not a young man is baptized?

A. It's made upon consultation with myself and that individual, based upon – I realize it's subjective, but how serious we feel they are about the commitment they have made.

It might be important for you to know our theology that precipitates the allowance of baptism. We do not see it as commensurate with church membership. We believe that baptism is a step that follows a commitment that a person makes in their lives to Jesus Christ. So we, on a subjective basis, upon the testimony of the individual, on some observation, some consultation with him, with camp personnel, how well he is doing in the program, we feel [2381] there are changes in the life-style if they have made that kind of contact, commitment.

So I think it's a very selective process. We have probably baptized less than 20 of the 175 young men in the program we've had.

Q. Do you recall the baptism of Fernando Belmontes?

A. Yes.

Q. Do you recall anything unusual about it?

A. It was an emotional time for him. It meant something very special to him. As is observed and as we participated in it together, it was something that he meant, as much as I could ascertain that from observation.

Q. You have been involved with convicts many years, I assume.

A. That's right.

Q. You know part of the meaning of the word convict is that people try to con you. Do you know what that word means?

A. Yes.

Q. What does it mean to you?

A. To try to manipulate for the purpose of incurring favor.

Q. You had an opportunity to observe Mr. Belmontes for about a year?

A. Yes.

Q. And you did agree to baptize him?

A. Correct.

Q. Did you feel that he was conning you?

[2382] A. No.

Q. Why not?

A. Well, again, it would be based upon my experience with I think a rather sizable group of men.

I will tell you in the M-2 program were reconciled to the fact that there are a high percentage of men who utilize the program for manipulatory reasons. They like the idea of getting out and being in homes. Who could blame them?

Our sponsors tend to pay very special attention to them, provide a home kind of enviornment for them while they're separated from their families. It would be a highly desirable thing to try to get into the program.

Many of them are guilty of trying to con families for favors.

There are many rules that go with the program. Many try to get the sponsors to bend the rules.

I know for a fact that was never Fernie's approach to the program.

Many would take advantage of the opportunities to go outside the facilities, but not be involved with us when we came on the grounds, which required some sacrifice because they would have to leave regular activities that they were pursuing, softball games.

Fernie was one of those exceptions who always came, even to the on-grounds activities.

Q. You're aware the reason we're here is following Mr. Belmontes' release he's now been convicted of a very [2383] serious crime?

A. Yes.

Q. You're aware of the background of that crime?

A. Yes, I am.

Q. You have not had an opportunity to talk to Mr. Belmontes since he's been released?

A. No, I have not.

Q. Do you feel that there's something incompatible with the fact that he could be convicted of such a crime after having gone through this –

MR. SUEYRES: Pardon me, Your Honor. That's completely objectionable.

THE COURT: The objection will be sustained.

MR. SCHICK: Q. Let me ask you this Reverend Barrett: Do you have any personal views with regard to the question of the death penalty?

A. Yes.

Q. What are they?

A. I believe in the death penalty.

Q. All right. Do you believe it should be applied in certain situations?

A. Yes, I do.

Q. You've been able to observe Mr. Belmontes for a period of time?

A. That's correct.

Q. As I said, you know the nature of the offense that he's been convicted of?

A. Correct.

[2384] Q. Do you feel that he is deserving of the death penalty?

A. No.

Q. Why not?

A. Well, you're going to ask me to call upon my subjective evaluation at this point. I acknowledge that at the outset.

I do feel that the point of premeditation in some of those things involved, which would be points that I would be in compatibility with the death penalty, are not existing in this case.

I see Mr. Belmontes as salvageable.

I see Fernie as a person with a lot of extenuating circumstances in his life to which I was privy in terms of our sharing and counseling together.

The enormity of the peer pressure and the kind of sociological circumstances that were part of his life I feel very conducive to some of the situations in which he found himself.

But I feel that, with regard to his character and his resolve, that – and the premeditation factor, that this is not an applicable punishment.

Q. Do you think that if he is behind bars for the rest of his life he can contribute in any way?

A. I'd like to think so. I'd like to think so, based upon the tremendous success that is being realized by a number of people involved in prison ministries. I'd like to feel that we are having a great deal of success.

Perhaps someone could say with regard to Fernie, "Do [2385] you feel you're a failure?" Obviously, this is not the result we would like to see.

About 80 percent of our young men in the program do well, stay out of trouble. The rate of recidivism has been

greatly affected by M-2 programming. I like to think we make a contribution to their lives and sense of well-being and self-image, and prison ministries can continue to contribute that to the lives of young men who have failed.

Q. Would you see yourself being involved in a prison ministry with Mr. Belmontes if he is in prison?

A. Yes, if the issue of proximity would be resolvable. If not, I would be anxious to direct others to him geographically on the basis of my associations.

MR. SCHICK: I have nothing further.

THE COURT: Mr. Sueyres.

CROSS-EXAMINATION

BY MR. SUEYRES: Q. Mr. Barrett – pardon me. Is it reverend? Is that the way you're addressed?

A. Dale is fine.

Q. All right. Okay.

Reverend Barrett, you do acknowledge that there is a high percentage of the people that are in your program that are there for what you described as manipulative reasons?

A. That would be my guess.

Q. And that's a risk you knowingly and willingly take because the purpose of the program is not to – well, the [2386] purpose of the program is to try to get people who have not yet seen Christ or come to Christ?

A. Are you asking my opinion if that's the purpose of the program?

Q. As I understand it. Is that right?

A. No. That is how we might interpret it in our own local circumstances.

The M-2 program not only matches people with quote Christians unquote, but with other people with other religious backgrounds as well.

If you would like me to be specific about my situation, yes, that would be a highly desirable part of our program.

Q. And I think, as I understood it, you were saying that while there's a high percentage of people in the program for the wrong reasons, if we may –

A. I think we're aware of that. We're not naive.

Q. But, in your judgment, Mr. Belmontes was there for the right reasons?

A. I believe so, in terms of how it was lived out in his day-to-day life-style.

Q. Do you admit or could you conceive the possibility that you may be wrong?

A. I think people's intentions are not always commensurate with the resultant acts that happen because of circumstances that contribute.

Is that an evasion of your question?

[2387] MR. SUEYRES: Q. No. Suppose –

A. I don't feel wrong about my original feeling about Fernie.

Q. Would your opinion be the same if you knew that he stated that his intentions in going into the program was to take advantage of the benefits or for the wrong reasons?

A. No, because I think that many men at the outset of the program do enter it for that reason but their motivation changes as they discover the other elements. Fact they are cared for and loved dispite of their failure. For many it opens up a whole new arena for experience and exposure. Most of them are from single parent families, divided family. Are not related to any kind of secure feeling.

So that may have been his original intent or could have been, very much conceivably, I would ascertain his motivation on the basis of the long range and duration of the program and his participation.

Q. Now, after he left the youth authority, or the institution, Pine Grove, that was the last you ever saw of him?

A. That I saw of him. I kept contact through the reports of his sponsors who did write him and hear from him from time to time.

Q. He never visited you at the institution?

A. No, They are not allowed to.

Q. Nor at your church?

A. They are not supposed to, and as far as I remember he didn't come back after that time.

[2388] Q. They are not allowed contact with you?

A. They are not supposed to return to the community where they have been incarcerated.

Q. Well, were you aware that he was working at the Pine Grove Forestry Camp?

A. While he was incarcerated?

Q. No, afterwards.

A. No, I guess not.

Q. In one of your – one of the questions you were asked, you were asked whether you were aware of the nature of Mr. Belmontes' present conviction.

A. Yes.

Q. From whom did you receive that information?

A. Heard from a variety of sources. I've heard it from – first, somebody at the local institution. I can't remember. That was my first point of contact.

I heard it from his sponsors. And, primarily, those have been the sources.

Q. Okay. No one has explained the precise jury verdict to you?

A. Well, I'm aware that he was judged guilty of first degree murder.

Q. Well, really it is – there is – you've expressed an opinion and it is premised upon certain assumed facts, and that is really want I want to go to, is that you were saying that you believe in the death penalty but you know the nature of this conviction. And –

A. I did not say –

[2389] Q. You believe there was no premeditation in this case?

A. From the information I have I feel premeditation is a debatable point at this point. My knowledge is obviously limited.

Q. Well – and that is the very point I have to make. You haven't read the transcript, I take it?

A. No, I haven't.

Q. Nor discussed the testimony of individual witnesses?

A. Not really.

Q. No, All right.

So in a sense, it is difficult for us to know upon what you base your information, whether it jibes with what the jury has been allowed to hear in this courtroom.

A. I guess I would say that I have known him for a year, whereas the jury has known him for the duration of this time they have had him here. And I think my relationship is built on a protracted period of time. So I'm talking about character and some of the things I have observed over an elongated period of time as opposed to a limited exposure.

Q. But do you – you have to admit, you really don't know for a fact what he has been accused of or convicted of?

A. Well, how factual would you like me to be?

Q. Well, your opinion is premised upon the fact that from your knowledge of him you don't believe premeditation could exist?

A. That's correct.

Q. So, if I – if you were told that premeditation did [2390] exist, your opinion would have to change, wouldn't it?

A. If you could convince me premeditation existed.

Q. Moving onto another area.

The views that have been solicited from you concerning the application of the death penalty in this particular case really seem to turn upon your ideas of rehabilitation. Would you say that is fair? Or the possibilities of rehabilitation?

A. I think it is a factor, a factor.

Q. Well, I think your statement was –

A. I'm not sure I understand your question.

Q. – you believe him to be salvagable.

A. Yes.

Q. Would you say that that is the key to your belief that the penalty is inappropriate here?

A. No. I really rather have you not tell me what I think and let me try to tell you what I think.

Q. I'm sorry, I don't mean to put words in your mouth.

A. I really feel with respect to the death penalty, my basic feeling is I see it as a deterrent to crime. I see it applicable in situations where premeditation is involved and the person determines that is what they are going to do before they expedite a crime.

But in terms of individuals where there are certain circumstances extenuating with regard to what happens, what are some of the factors that have contributed to their background and their character and this sort of thing and when they are salvagable, those things combined together, [2391] not taking any singular aspect, would probably contribute to my personal feelings.

Q. All right. And obviously, that is what was asked of you, was your personal feeling, and that is what you are giving us?

A. Yes.

MR. SUEYRES: All right. Thank you. I have no further questions.

THE COURT: Mr. Schick, anything further?

MR. SCHICK: No.

THE COURT: Thank you.

MR. SCHICK: He may stay now in the courtroom?

THE COURT: You may stay, yes.

MR. SCHICK: Next witness would be Don Miller.

THE COURT: Don Miller, please.

Mr. Miller, come right up this way if you will. We'ed ask you come over by the court reporter, please, sir. Raise your right hand and face the clerk, she'll swear you in.

DON MILLER,

called by the Defendant, having been sworn, testified as follows:

THE COURT: Come around over here would you please, Mr. Miller.

We'd ask you state your full name for the record, sir.

[2392] THE WITNESS: Don Miller.

THE COURT: Spell your last for me.

THE WITNESS: M-i-l-l-e-r.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mr. Miller, what is your business or occupation?

A. I am a minister. I also am assistant chaplin at Preston, and I'm in the M-2 program, Northern California director.

Q. How long have you been involved in the M-2 program?

A. Approximately five years.

Q. What is your current work with that program?

A. I – my job at this point, we're doing mostly follow up after the people – fellas are released from prisons or all over California. We follow them up. Find employment. Kind of a big brother situation on the outside, to help them get back on their feet and make good citizens.

Q. Okay. Now, you know Reverend Barrett?

A. Yes.

Q. He is at the beginning of the program and you are after the ward is ready to be released from prison?

A. Right.

Q. And help them reintegrate into the community?

A. Yes.

Q. You know Fernando Belmontes?

A. Yes, I sure do.

[2393] Q. How long have you known him?

A. About – it would be about two years, two to two and a half, in that neighborhood.

Q. When did you first meet him?

A. I met him up at Pine Grove in the church from the program that's been working with the Pine Grove Camp. That is the first I've met him.

Q. Did you know him during the course of his stay at Pine Grove?

A. Yes, very much so.

Q. Did you come to know him through his participation in that church?

A. Yes.

Q. And were you involved at all in finding Mr. Belmontes a place after he was released from Pine Grove?

A. When he was released from Pine Grove it was a little bit hard to find a place we could put him. We found a halfway house in Oakland that would take him with some people that we knew that were involved in the prison ministry, both up at Vacaville and San Quentin and different places around.

Q. And what placement was he actually put into?

A. He was put into the Exodus House in Oakland. It is on the east side of Oakland.

Q. You are aware of what happened after he was placed in that program?

A. I have heard what happened. I was aware to a certain extent that he found a job with some forest service or [2394] parks or state over in the Lodi area and he moved over here.

Q. Okay, That he did leave that particular placement?

A. Yes, he left that place.

Q. Did you have any contact with him when he was living in Lodi?

A. In Lodi? No. Only by phone. Perhaps a couple times by phone, but no, I had no contact while he was living in Lodi.

Q. What sort of things do you do in terms of being involved in the institution with the wards through the M-2 program?

A. The purpose – as far as the institution at Preston, the purpose of what we do there is we go one on one with the fellows. We discuss with them the possibilities of after their release of getting back on their feet. Doing what will keep them out, keep them out of trouble, things like this. And then we follow that up at the time that they are released.

We are getting inot contact with their parole agent, wherever it is in California, and we work with him to help them find, as I say, a job, someone in the neighborhood that might have a job. A lot of times we use businessmen who will work with them, give them – help them get started back on their feet and keep them going in the right direction.

Q. Okay. Do you ever attend hearings for parole with wards you work with?

A. Very much so. When the boys are ready to be paroled [2395] from Preston and men are ready to be paroled from Preston I attend lots of times. Go and sit down with the parole agents and talk with them and discuss what the need is. Sometimes my feeling may be that I feel the fella is getting out a little bit sooner than he should and sometimes they'll keep him longer for that reason.

Q. Do you go to the actual hearing in which parole is going to be granted?

A. Yes,

Q. Did you go to such a hearing on Fernando Belmontes' case?

A. No, I didn't.

Q. Why didn't you?

A. Because I wasn't asked to and he was at Pine Grove and at the time he was at Pine Grove why we didn't do that as much as we are now. At this time we are doing considerable of it.

Q. Were you asked your opinion as to whether or not he should be paroled?

A. I would have, at the time he was paroled, I think I would have been just a little bit doubtful. I would probably have felt that he should have been, not necessarily incarcerated longer, but he needed, I felt, a little bit more orientation along some lines.

Q. What lines are you talking about?

A. Accepting authority and being able to adjust to the community on the outside. That is one of the problems with most of the men after they are released. It is hard to [2396] really adjust on the outside in a new environment. Just as hard as going in.

Q. In what way?

A. In the way – for example, we've taken them many times just before they are being released and we take them out to dinner. They don't know how to order because they've been told – for maybe five to ten years the food is set before them and that is what they eat. They need to know how to adjust to the community in that way. They also need to have – they need to understand the people

that they meet on the outside. That they stay with people who will show them a better life instead of getting back in with their old buddies.

Q. Since Mr. Belmontes was released, have you had any contacts with him?

A. Yes. I visited him in the county jail.

Q. How many times have you visited him?

A. Just – I think it was just once. We had fellows who visit in the county jail here all the time that have been seeing him considerably that are not exactly associated with us but we know each other and work together.

Q. Okay. And you are aware of why we're here today, that he has been convicted of a very serious crime?

A. Yes.

Q. You've had a chance to talk to him after he was arrested for that crime?

A. Uh – huh. (Affirmative)

Q. Do you feel you could work in any way with Mr. [2397] Belmontes if he were in prison for the rest of his life?

A. I would be very glad to work with Mr. Belmontes. In fact, if he is sent to Vacaville, on the way there will be people of our group that will meet him there and start using him to talking to the other men in the prison so that other fellas when they get out don't get into the same thing that he has gotten into.

Q. Why would you be using him in that particular way?

A. I feel he has the personality that can work with especially people of his own ethnic background and explain to them – we have had great success with people who are in prison who go and talk to the other young fellas coming in and explain to them what its all about. Explain to them they don't need to get back into this place, that there is something good for them.

Q. Do you have programs in all the prisons in the State of California?

A. Just all of them in Northern California. Well, we have them in all of California, but most of – I take care of mostly just here in Northern California is where I work most of the time. Don't get down south at Chino and those down there.

Q. Following Mr. Belmontes' release from Pine Grove, was he ever involved in such counseling type activities from other wards?

A. After he was released from Pine Grove I took him into Preston a couple of times on a visit to the other wards there and he went into the chapel and told the wards in [2398] there, explained to them what it was like on the outside and was well recepted there by the other men. We already did that through the Exodus House he was in in Oakland. They brought him over.

Q. Is this the sort of activity you see you could use him in the prison system in the future?

A. Yes, Definitely he would be used in the prison system for this sort of activity, which is seemingly at the present time the only solution to a lot of our prison population. You have to get right on the inside to explain to them the alternatives that they really have.

MR. SCHICK: I have nothing further.

THE COURT: Mr. Sueyres.

CROSS-EXAMINATION

BY MR. SUEYRES: Q. Mr. Miller, if I understand, you were never the M-2 sponsor of Mr. Belmontes?

A. No, I never was.

Q. Okay. You mention that he did return to the institution several times, but this was while he was living at the Exodus House?

A. Yes.

Q. You were aware he was only there for two weeks?

A. That's right. It was twice he went from there. We have a program there every Tuesday and Thursday night at Preston and also on Sunday afternoon, and I'm sure, I remember of him being there at least two times. Would have been more if he had stayed at the Exodus House.

[2399] MR. SUEYRES: Thank you. I have no further questions.

THE COURT: Thank you, Mr. Miller. Thank you for coming. May remain in the courtroom if you'd like.

MR. SCHICK: Fred Haro.

THE COURT: Fred Haro, please.

Mr. Haro, would you come up this way, please. Come right up this way, sir. Come over by the court reporter if you will. Ask you to raise your right hand, the clerk will swear you in.

FRED JESSE HARO,

called on behalf of the Defendant, having been sworn, testified as follows:

THE COURT: Right up here, please, Mr. Haro. State your full name for the record, please.

THE WITNESS: My name is Fred Jesse Haro, H-a-r-o.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mr. Haro, where do you presently reside?

A. Volcano.

Q. In another county?

A. Amador.

Q. Where do you work?

A. I work here in town.

Q. You formerly lived in San Joaquin County?

[2400] A. Yes.

Q. Are you acquainted with Reverend Dale Barrett?

A. Yes, I am. He is my pastor.

Q. You are a member of his church?

A. Yes, I am.

Q. Are you acquainted with this young man seated to my right?

A. Yes, I am.

Q. You know him by name?

A. Yes.

Q. How do you know him?

A. Fernie, yes.

Q. How long have you known Fernie?

A. I've known Fernie for about a year.

Q. When did you first get to know him?

A. Through our church program at church. I became a M-2 sponsor and I became Fernie's sponsor. I've also had about four other sponsors, so Fernie is a long line of sponsors I've had.

Q. You and your wife have sponsored other wards into CYA into your home?

A. Yes, white, Mexicans and blacks.

Q. Can you explain to the jury how this program works for you, the sponsor?

A. It is kind of hard to explain, but I know that – I know that the kids need a lot of love and I know in a place like that they certainly wouldn't get it. And I received Jesus Christ in 1962 and it made a change in my life. And [2401] when it did I really opened up my heart to do a job for kids like him.

Like I said, I've had blacks and whites and Mexicans, so not just an individual group, just people that need love. And so we joined this and we found that we – I think we contribute quite a bit to a lot of boys that we've had. In

fact, all the boys we've had I think we contribute something.

Q. How long was Fernie your sponsor?

A. We had Fernie, oh, about a year, but –

Q. Is that about the same length of time you've had the other boys?

A. I think Fernie is a little longer than we had most of them. Most of them were – we started the sponsorship I think in '79 and we've had, I think, five. Some are just getting out and I lost one or two, and start another session. But Fernie was the one I had the longest, yes.

Q. How many days out of the week would you normally get to relate to the ward?

A. I have – most all – we took special care in our kids that we've had. We took them on Saturdays and Sundays and Wednesday nights. Only time we didn't get them was during fire season we get them once a month, a Saturday and Sunday. So we had Fernie in the home almost two days out of the seven.

Q. What sort of activities did you do?

A. Excuse me?

[2402] Q. What sort of activities did you do with him?

A. Walked around the place and just talked and had fellowship and just like you would do in home with your own boys. He'd kick back and read or eat. I mean, I never babied him. The refrigerator is there, go and eat. Don't put up your hand for the bathroom. You know where the

bathroom is at. I treat them all the same like my own sons. Hey, this place is yours. Treat it like your own. I never had any trouble with any of my boys.

Q. Okay, Did Fernie help out around the house at all?

A. Yeah, but it wasn't required, you know. We didn't take out a M-2 boy to work him. It was just to have him around the house. Let him know people cared for him. We sit down and have chats. If he felt in the mood of talking or I felt in the mood of talking we'd sit on the porch and talk about his life and my life and how things could be better or worse, you know, the circumstances. I had a stepson who was living at the time, too, and I'm quite sure Fernie gave him a lot of help. And at the teenage stage, if anybody has teenagers you know what they are like, they are all in there somewhere and they all need help. And I'm quite sure Fernie, him talking to him done a lot of good to him.

Q. You spent quite a bit of time talking to Fernie?

A. Yes, we spent quite a bit of time talking. We talk about his home, his life, what his plans were, where he was going, what he wanted to do and that kind of counseling along the way. Hey, you know, there is a better way to [2403] live.

Q. Did you feel he responded to that?

A. I think he did an awful lot of responding. He came to church and he made a commitment, you know, and you've got to remember, wards, his own peers are there at church, too, and he made a commitment for Christ, and he also was baptized. And it wasn't easy to be baptized because I've been baptized myself and that is not an easy

thing to go up in front of a whole bunch of people and proclaim that you received Jesus Christ and he has done this.

Q. You've had some other boys in your home you say?

A. I've had some that give me quite a snow job, but I got, well, you know, you still love them, you know, regardless of what, you still love them. And like I said, I had one boy that, like I say, he was there just to get outside and I knew that. And regardless of that we tried to help him, too, and I think we did help him. In fact, he called us back about, oh, about three weeks ago and wanted to know if he could come up. I think he is married. He is married now. That made me feel good that he called.

[2404] MR. SCHICK: Q. Did you have any evaluation of Fernie, whether he was giving you a snow job?

A. No, Fernie never gave me a snow job.

Like I said, I got to treat him like a father and son. He called me dad.

I know myself, being in the situation that I am, it's awful hard for me to call my father-in-law dad when I had my own dad. I've grown to love him so much, I've done that.

I'm sure me and Fernie had just a real good relationship with one another.

Q. Do you remember anything unusual about the very first time you met Fernie in the institution?

A. Oh, he was kind of shy. You know, he wasn't real pushy like some boys. Some boys jump right on the wagon.

They want to let you know that you're all right. He was never pushy.

I had to make the approach. I'm the kind of person that likes to be approached. It was kind of a little battle as to who was going to make the first approach.

Q. Did he tell you anything about himself?

A. Yeah. He talked about himself. I think he told me that – something about him being – how he got there. I guess he wanted to scare me, I guess.

I told him, I said hey, I says, – not scared. Just to let me think that all the kids are in there for something. Maybe I worded that wrong. He wanted to be honest with me, I should say. He wanted to let me know, hey, this is what I'm here for.

[2405] Every boy that I've ever had – most of them have said I'm here for this or that.

I say hey, if you want to talk about it, we'll talk about it. If not, we won't talk about it.

Fernie told me why he was there.

I didn't care why he was there. My intentions were to help him, like I had done the rest.

Q. Have you had any contact with Fernie since he's been released?

A. Since he's been released? Yes, I've had contact with Fernie.

Q. Before he was arrested?

A. Oh, yes, way before he was arrested, yes.

Q. How much contact did you have?

A. We went up to the halfway house with him. We got him moved in, got him situated. Then we met him there.

He didn't seem to be very satisfied there.

I don't know were we – yeah, we must have helped him move in Lodi here. I don't know if we were physically helping, but we met him there. One of the two.

He had an apartment there and he had his baby and he had his girl friend. He was trying to make a good life for himself.

I think at that time he was working for the forestry, up in Pine Grove, that area someplace.

Q. You're aware of the reason why we're here, the fact he's been convicted of a serious crime?

A. Yes.

[2406] Q. You know some of the facts surrounding that crime?

A. Very little of the facts. I do know that he's here for a serious crime.

Q. Okay. You've testified to your knowledge about his personal background and his character as you know it.

A. Yes.

Q. Do you have any personal views on the death penalty?

A. Excuse me. I didn't hear you.

Q. Do you have any personal views on the subject of the death penalty?

A. I'm strongly for the death penalty. That's the way I believe. That's the way I am. That's the way it is.

Q. Do you have any personal opinion about Mr. Belmontes as it relates to the death penalty from what you know of him?

A. I didn't hear you.

Q. Do you have any personal views as to Mr. Belmontes as you know him as it relates to the question of the death penalty?

A. What his views would be?

Q. No. What your views are about him with regard to the death penalty. You know he's on trial here for his life.

A. Right.

I don't think – I believe – I don't know how I should say this. I believe Fernie is innocent. That's the way I feel.

Q. Is that the only reason you have reluctance about his – what happens to him?

[2407] A. No. I have compassion as a son for him. Like I said, I've loved all my – but I just feel that – I don't think Fernie is all that guilty myself. That's the way I feel.

Q. You've had contact with him once or twice since he was released?

A. Yeah, the two times I've told you, once in the halfway house in the Bay Area and here in Stockton here when he was getting a job and working.

MR. SCHICK: I have no more questions.

THE COURT: Mr. Sueyres, you may cross-examine.

CROSS-EXAMINATION

BY MR. SUEYRES: Q. Mr. Haro, you knew Mr. Belmontes in what could be described as a very structured setting, I think. Would you agree?

A. What are you trying to say? I don't –

Q. In other words, when he was with you, he knew that there were certain expectations of him. He didn't have to raise his hand to go to the bathroom, but he had to submit to your authority and your direction.

A. No, not really so, for the simple reason when I brought him in, I treated him as my very own son. I said, "Hey, you have the run of the place." That's what he had. He just had the run of the place. He had no special privileges. Like my own kids, you know. I didn't say you can't do this or that. This is your home. You want to take a nap, lay down and take a nap. You want a drink of [2408] water or milk, you want to go out on the deck, you want to go swimming – well, we didn't have a swimming pool then. But you want to go in the swimming pool, go right ahead.

Q. There were certain expectations that this program – I mean this M-2 program was meant for him to interact with you. Probably the most important part, wouldn't you say, is that you would talk to him to try to gain his confidence and show him something else in life?

A. I see what you're getting at. Yeah. We'd communicate real good back and forth. I mean he'd communicate with me and I would talk to him like a father.

Q. These expectations, if we can call them expectations, or these goals, at least, of the program required that he had to go along with the goals of the program. In other words, if he didn't want to talk to you, if he didn't want to be in the house, if he wanted to leave and walk away and do whatever he wanted to do, why that would be inconsistent and he wouldn't be allowed to stay with you, isn't that right?

A. I don't know what you're trying to say, but –

Q. Let me take a concrete example. While he was in your care he was disciplined and restricted for 90 days at the institution because he left your supervision and the county fair.

A. Who?

Q. Mr. Belmontes.

A. Oh, oh, oh. Well, let me put it this way: At the county fair – I don't know – at the county fair, when we [2409] were just walking around, there were lots of people, and I think he had to go to the bathroom at that time. He was with my stepson. So they went to the bathroom. I mean, you know, is that what you're trying to say? What's the big deal? He had to go to the bathroom. I wasn't the type of person – I don't go to the bathroom with my own son. Why would I go to the bathroom with Fernie?

Q. Mr. Haro, all I'm saying is somewhere in there he did something he wasn't supposed to do and he was

restricted for 90 days because he left your supervision. Isn't that true?

A. Something like that. But that was between him and the camp. I understand what you're saying, he was under my supervision for that and I guess he had to pay the price for it. I didn't think it was that big an issue. I mean, you know. Maybe it was my fault that I should have went to the bathroom with him because I should have known my responsibilities toward him and I was lax.

Q. Counsel has asked you about whether you feel the ultimate penalty is appropriate for Mr. Belmontes, and you've indicated that your personal view is that he shouldn't have that, is that right?

A. Explain that again. You have to speak up louder.

Q. I'm sorry.

Counsel has asked for your personal view as to whether Mr. Belmontes should receive the ultimate penalty in this matter. You told him you didn't think that he should.

A. That's right, I don't think that he should.

[2410] Q. And that is based upon your belief in his innocence?

A. Yes, it is.

MR. SUEYRES: Thank you.

I have no more questions.

THE COURT: Mr. Schick, anything further?

MR. SCHICK: No.

THE COURT: Thank you, Mr. Haro.

You may remain in the courtroom, if you so desire.

MR. SCHICK: Beverly Haro.

THE COURT: Beverly Haro, please.

Mrs. Haro, come right up this way, if you will, please. Come right around over here, if you will, Mrs. Haro. Stop right there and raise your right hand and the clerk will swear you in.

BEVERLY HARO

called as a witness for and on behalf of the defendant, having been sworn, testified as follows:

THE COURT: Right up here, please.

Please state your full name for the record, spelling your last for us.

THE WITNESS: Beverly Haro, H-a-r-o.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mrs. Haro, you're married to Fred Haro, who was just on the witness stand?

A. Yes, I am.

[2411] Q. Do you know Fernando Belmontes, the young man seated to my right?

A. Yes, I do.

Q. How long have you known him?

A. Oh, I think it goes back to 1979, when we became Fernie's M-2 sponsors through our church.

Q. Were you involved with the M-2 program before you met Fernie?

A. Yes, we were. We've been involved since 1977. We had two other boys before we received Fernie as our ward.

Q. Okay. Do you recall the first time you met Fernie?

A. Yes.

It's a practice that when you're going to sponsor an M-2 boy that you are to go to the camp and meet him on the grounds first and visit with him before you're allowed to take him off the grounds and into your home to see if you feel compatible and whether you both like each other and would like to work together.

My husband and I went to the camp and we were taken into this little conference room, and then Fernie came in, and we sat down and just introduced ourselves and told him that we were going to be his sponsors and just kind of made some small talk.

He just said he wanted to make things clear to us that before we became very involved in him, he wanted us to understand what the charges were that he was there for, that they were serious, and that if we felt that they were too serious or we felt uneasy about bringing him into our [2412] home, that he would understand and not blame us.

So he told us why he was there, and we just said that was fine, it really didn't make that much difference to us, that we were there just because of the Lord and wanted to just really witness to him and hopefully help him in his future.

Q. Did you decide to sponsor him after that meeting?

A. Yes, we did.

Q. Okay. For how long then did you remain sponsors?

A. We sponsored Fernie until he was released. I believe Fernie was released in 1980. We were his sponsors when he was released from the camp.

We also stayed in touch with him after he was released, when he was on the outside.

Q. Okay. Did you have much occasion to talk to or get to know him over the course of that year?

A. I would think so.

We picked Fernie up every Wednesday evening for church, usually around 6:30 in the evening, and brought him back to camp by 9:00; every Saturday at one o'clock in the afternoon until ten o'clock at night; and Sunday mornings from 8:00 in the morning until ten o'clock at night. We did this from probably November of 1979 until he was released in 1980.

During these times we had him usually in our home, but we also would go shopping or whatever our normal family functions were, and Fernie went with us. He was just like part of our family. We never looked at him any differently [2413] and treated him as one of us, as our son.

Q. Did you ever discuss with him his own life?

A. Well, he volunteered a lot to us. I don't know. I can't say what he told my husband. I can only tell you what he confided in me.

Q. Did he talk about his family life?

A. Yes.

Fernie grew to be very close to us and he calls us mom and pop. He's like a son to us and like a brother to our boy Dan.

He's told me that when he's at our house or with us he has never seen this side of life before. He didn't know that people lived like we live. He's always known street fighting.

He said that I probably was closer to him than his mother in his way, that he could talk to me, tell me the things about his childhood, tell me the hurts, the need for love, the caring that he's never seemed to have had, that he felt good in our home, he felt loved for the first time, that he never knew what it was for strangers to open up their arms and just completely take him in with no reservations, no questions asked and give like we gave and the people in our church.

Q. Was he involved in activities at your church?

A. Yes, he was.

He attended Sunday school, he attended the picnics that we had, he attended the services that our pastor held at the camps and any functions, Sunday night services or [2414] movies or anything that was going on, Fernie was

always part of. He went with his group in the Sunday school.

We've never had, you know, a problem.

Q. Were you present when he was baptized?

A. Yes, we were.

Fernie made the decision that he had accepted Jesus Christ and wanted to follow into baptism.

Before you can be baptized at our church, our pastor requires that you go through some classes with him, which Fernie attended.

He was baptized one Sunday afternoon.

He gave a statement before his baptism as to Fred and I taking him into our home as strangers and giving him love that he had never ever seen before and the difference that it had made in his life and the change in the direction that he was going in now as opposed to, I guess, what he had come from.

Q. Now, you have a son?

A. Yes, we have a son Danny, who is 18.

Q. Danny is 18 now?

A. Yes.

Q. At the time that Fernie was in your home were he and Danny about the same age?

A. I think Fernie is probably two years older than Danny. And at the time that we had Fernie, Danny was

going through his typical teenage years of parental rebellion, talking back to mom and things like this, you know, thinking that he needed to go and do his partying.

[2415] Fernie would always talk to him and tell him about Danny not realizing how well he had it at home, that he wished he would have had a family life and a home like Danny had and that Danny was not appreciating it, that he was just taking advantage of us, and would always try and tell Danny, you know, don't talk like that or you don't want to end up getting yourself in trouble and being like me because I'm locked up now and I can't be free like you. And he would always talk to him and try to steer him right and tell him that it sounds good what Danny was thinking that he wanted to do, but that isn't really what Fernie was saying. He says, "You've got everything here and you don't realize it."

[2416] MR. SCHICK: Q. Did you ever meet Barbara Murillo?

A. Yes, on several occasions.

Q. And did you ever have occasion to see Fernie after he was around Barbara?

A. Yes, I saw Barbara and Fernie together at our house. And, of course, I've known Fernie, like I said, since we've had him as a ward. Then I saw Barbara. She came up to visit and immediately there is a change. Barbara is a, in my eyes, a definite negative factor in Fernie's life.

I told Fernie this. It is nothing that he is not aware of. I took him aside that day and – we live out in the country and we have this kind of little private walk that goes through the trees and a big tree stump and this is our place where we go talk, and our son and I go talk there

and Fernie and Danny go talk there. So we went over there that day, and I told him that I have never seen anybody pull somebody down so fast as Barbara did to Fernie. That the peace that he had inside, the ability to believe in himself, to have confidence, was all gone within a matter of just a half day of Barbara being there. His attitude completely changed. He became sullen. He was very moody. He wasn't happy and peaceful any more. And he – I just saw such a definite change in him. I said, if she can do this to you in a half a day, what is she going to do when you are free and you are together all the time?

MR. SCHICK: I have no more questions.

THE COURT: Mr. Sueyres?

[2417] MR. SUEYRES: I have no questions.

THE COURT: Thank you.

Thank you, Mrs. Haro. You may step down.

MR. SCHICK: I have no more witnesses.

THE COURT: Defendant rests?

MR. SCHICK: Yes.

THE COURT: You have a rebuttal witness, Mr. Sueyres?

MR. SUEYRES: Yes, Your Honor. I wasn't able to catch the Court at the recess.

There is a witness enroute from Southern California who is arriving during the lunch hour, and we also have a witness essentially for one question that I can put on at the present time.

THE COURT: All right. Let's do that.

MR. SUEYRES: Sergeant John Donaldson.

THE COURT: Sergeant John Donaldson, please.

Sergeant Donaldson, come right up this way if you will, please. Come over by the court reporter and raise your right hand and the clerk will swear you in, sir.

JOHN T. DONALDSON,

called by the People, having been sworn, testified as follows:

THE COURT: Right up here.

We'd ask you state your full name for the record, sir.

THE WITNESS: John T. Donaldson, D-o-n-a-l-d-s-o-n.

[2418] DIRECT EXAMINATION

BY MR. SUEYRES: Q. Occupation, sir?

A. Detective for Ontario Police Department.

Q. How long have you had that employment?

A. 25 years.

Q. I would like you to think back to February 25th, 1979. Were you employed with the Ontario Police Department on that day?

A. Yes, sir.

Q. Did you have occasion to arrest Fernando Belmontes that day?

A. I did.

Q. Do you recognize him?

A. Yes, sir.

Q. In the course of the arrest, did you have occasion to talk to him?

A. I did.

Q. Specifically, did you ever question him concerning possession of any firearms?

A. Yes, sir.

Q. Would you tell us what was said?

A. I asked him about weapons and at that time he says, "I don't have any."

And his reply, "My only weapon is the Bible."

MR. SUEYRES: Thank you.

I have no further questions.

THE COURT: Mr. Schick?

MR. SCHICK: No questions.

[2419] THE COURT: Thank you, Sergeant. Thank you for coming up.

MR. SUEYRES: Your Honor, we have all the instructions that we can probably spend our time on.

THE COURT: I think we should do that during the lunch hour then I can go on out to the state hospital at that point in time. Then we can reconvene at three o'clock, hopefully. I'll be back, hopefully, at 3:00.

We're going to take our noon recess of approximately three hours, and please come back, ladies and gentlemen, at three o'clock. Hopefully I'll be back. Calendar looks like a little more extensive than I thought about, but I hope to be back by then. So at 3:00, please.

(Recess at 11:54 a.m.)

(Motion in chambers.)

THE COURT: People of the State of California versus Fernando Belmontes, Jr. is called. We are in chambers with counsel. The defendant is present for our instructions –

MR. SCHICK: Judge, before we do that –

THE COURT: – conference.

MR. SCHICK: Since we are here, I would like to go over a point we talked a little about yesterday off the record. That has to do with the question that has been raised on many occasions regarding the disposition of the codefendant, and whether or not that evidence is going to be presented to the jury.

When we left yesterday, I had mentioned my view that [2420] it was admissible for a couple of reasons, one of which was I felt the command of *Gregg versus Georgia*, that the death penalty is reserved only for those most unusual and – unusual of cases I guess is the best way to

put it in the reasoning of the court, that a comparison for that purpose was appropriate.

It has been pointed out by the district attorney in relying on Freison, F-r-e-i-s-o-n case at 25 Cal 3rd, that some sort of review takes place at the Supreme Court when these cases are being decided, at least that was suggested or hinted at on that case.

I indicated at – last Friday when we had that discussion that I was not aware of that, and on the basis that this was represented as being an actuality, we did not pursue further the question of proportionality review.

I spoke yesterday to two different deputies in the State Public Defender's Office which office is handling the majority of death penalty reviews on appeal. They indicated an awareness of what Freison said and also an awareness of what the case of *People versus Jackson* at 28 Cal 3rd said about that subject and indicated it is not being done. There is no process by which the Supreme Court is reviewing cases on appeal. And in point of fact, indicated in the case of Robert Alton Harris, which this court is familiar with which is now currently before the 9th Circuit Court Of Appeal, on the writ of habeas corpus that the attorney general who represents the People overall has taken the position this should be done at the trial [2421] level.

And furthermore, in the Jackson case when a writ of habeas corpus or in the Harris case when the writ of habeas corpus was filed for the express purpose of ordering discovery and asking for proportionality review the Supreme Court turned it down without a comment.

Therefore, I have a grave concern regardless of what the Court may say on the information I can provide as an officer of the court, that is not happening. There is no way. In other words, if this court, if this jury and ultimately this court imposes a penalty of death upon my client there is not going to be any process by which the proportionality in that sentence in relationship to not only the codefendants in this case but to the defendants, the 31 or so cases in which special circumstances have been filed in San Joaquin County since the death penalty was put back on the books in August 11th of 1977, there is going to be no process by which that review takes place and I am very concerned about that.

I'm also concerned with regard to the specific question of whether or not disposition of Mr. Vasquez comes in. And I was given a case. I was put on notice yesterday that I was being too sneaky and not providing any case law.

First of all, I have a case from the Florida courts and I will cite it to the Court on the record. It is Messer, M-e-s-s-e-r versus the State found in 137 – excuse me, 330, 330 Southern Reporter, second series, page 137 decided by the Florida Supreme Court in March of 1976. In [2422] reading from there at page 141 I'd like to read into the record what the Court said: "We now turn our attention to the question of whether the death penalty statute was properly applied by the trial court during the sentence advisory hearing portion of the trial. It is our conclusion the trial court errored in application of the statute in two particulars. First, all though there is evidence in the record of the plea bargained second degree murder sentence received by appellant's accomplice, Brown, appellant was not permitted during the sentencing portion of the trial to submit

this evidence to the jury. We believe the jury was entitled to know that the codefendant, Ronny Brown, negotiated a plea of guilty to second degree murder and was sentenced to 30 years imprisonment."

I have also discussed, and it was done in a case that is not reported because it is a sentence of life without possibility of parole was imposed, but a Superior Court judge in San Mateo County –

MR. SUEYRES: I will object to any citation that is not authority.

MR. SCHICK: I can put it on the record. You can object after I state it.

THE COURT: He can put it on the record.

MR. SCHICK: Judge Zerne, Z-e-r-n-e Hanning, H-a-n-n-i-n-g in the case of *People versus Nelson*, San Mateo County Superior Court number C-97474 gave an instruction the basic gravamen of which the jury was to consider as another factor in their decision the question [2423] of fairness and the fact that justice should appear to be done fairly on the face of it. And he specifically instructed the jury as to the disposition of the codefendant and the end result was a verdict of life without possibility of parole.

And I think the fact that it can be done as stated in the Florida case and the fact it has been – and I would urge the Court if you wish to try to talk to this judge to see why he did it. It has been done. I'm not just talking, blowing in the wind. There is a reason for putting such evidence in before the jury and I'm renewing my request to do so.

THE COURT: Mr. Sueyres?

MR. SUEYRES: Your Honor, in *Gregg versus Georgia*, U.S. Supreme Court endorsed prosecutorial discretion in the seeking of the death penalty and in plea bargaining. It said there was legitimate reasons why that existed, and that the death penalty was constitutional, even though prosecutor had this discretion to choose to seek it or not.

So in one sense counsel's attack is an attack upon the exercise of prosecutorial discretion, and the U.S. Supreme Court has already found that constitutional.

In another sense, he's asking the Court to consider that in fairness the jury should know of what happened to the codefendants. And so this is the very argument he's making.

If the jury believed Domingo Vasquez guilty of more [2424] than what he was convicted of and, therefore, got some kind of a benefit he did not deserve, the jury should make Fernando Belmontes sentence purportional to and give him a break that he doesn't deserve in the same purportion that Domingo Vasquez got a break.

Now, that is exactly the relevance counsel is suggesting. All right.

So what he's saying to – what he is asking the Court to do is to instruct the jury that even though Belmontes is guilty, even though the aggrevating factors outweigh the mitigating factors so that even though the law requires that they bring in a verdict of death they may exercise their raw power and reviews to bring in that verdict in order to give him a break which he doesn't deserve because his codefendant got a break he didn't deserve.

[2425] MR. SCHICK: I'm not saying the aggravating factors outweigh the mitigating. I think that's a misrepresentation. I'm saying it is a mitigating factor that has to be considered.

MR. SUEYRES: I know counsel doesn't concede the aggravating outweigh the mitigating. He's in effect arguing to the jury even if you believe the aggravating factors outweigh the mitigating, you may refuse to bring in that verdict in order that there be some intra-case proportionality.

THE COURT: Is that what he's saying, or is he not saying in weighing the mitigation versus the aggravation you can take into consideration as a mitigating factor what the disposition of the codefendant might have been?

MR. SUEYRES: Why? Why? That is the question, why?

THE COURT: Because of *Messer versus State of Florida.*

MR. SUEYRES: I heard that quote. That is an error on statutory construction. That's what the quote said. There was an error in applying the statute. As that supreme court interpreted their statute, their court had to allow it in.

Now, who knows what their statute is? Obviously, if it was from 1976, the law that was applied antedated *Furman versus Georgia* and *Gregg versus Georgia* and a generation of death penalty decisions.

[2426] MR. SCHICK: It's the same advisory statute that they have now, which was considered in *Proffitt versus Florida.* It's the same advisory system. This

court, which had the ultimate authority, regardless of what the jury did, said that for the jury not to have received that evidence was error. That's the question that they ruled upon.

THE COURT: It's an issue that has troubled me from the very beginning.

MR. SUEYRES: To take it one step further, counsel has cited a case out of a superior court in San Mateo County. That is not authority. We don't have a written decision. Even if we did, it is not authority and it may not be cited to the Court, any more than I can suggest to you that some court in Cucamonga, California, decided that that was inappropriate.

THE COURT: No, I will not take that into consideration in making the decision.

(Pause)

MR. SUEYRES: I have two arguments, really, for the Court.

One is the theoretical argument that such a factor is not provided for in statute or in any case law. As a matter of fact, the case law is contrary.

THE COURT: I couldn't agree with you more, Mr. Sueyres. There's nothing in the statute that provides for it.

MR. SUEYRES: Now we come to the practical aspect, Judge.

[2427] The Court has indicated it will not allow the People to relitigate a conviction involving a plea bargain.

Counsel now asks to relitigate the conviction of Domingo Vasquez. Besides seeming to be inconsistent and unfair, let me explain to the Court what such a relitigation will entail.

This superior court struck the special circumstances. The jury would be entitled to know that. Not this department, but this superior court.

They will also be entitled to know that I consulted with the Attorney General's Office in consideration of an appeal of that decision.

And they would be entitled to know what information I received and what case law I relied upon in deciding that an appeal would be unsuccessful.

They would then know that the most that Domingo Vasquez could be convicted of, by judicial action, was first degree murder.

Then we come to the problems with why he was allowed to plead guilty to second degree murder. I'll have to go through every factual and legal consideration that impinged upon that decision and explain the differences in the evidence available against Mr. Vasquez as the evidence against Mr. Vasquez that came in this trial.

Let me give the Court one small example. I made no attempt to object to the hearsay statements concerning the hearsay of Steacy McConnell when she spoke to her parents and said that Domingo Vasquez had threatened her. That was [2428] clearly hearsay, it was used for an improper purpose, and upon my timely objection this Court would have been bound to exclude it. I didn't object because I was going to let the defendant take his best shot at Domingo Vasquez. You know, it may seem inappropriate

that a prosecutor should be that altruistic, but that is in fact why I allowed it in.

But in the trial of Domingo Vasquez, I am certain that Mr. Vasquez' attorney would object based upon hearsay.

I was prepared to argue a legal theory. Judge Kim had not ruled finally. But I knew that the theory I was arguing was frightening to me because if I won, it could be a ground of reversal, and ultimately I was thinking that even if I won, I might choose not to put it in.

So evidence came in – the point is evidence came in against Vasquez at this trial which would not be available at Vasquez' trial, and the jury would have to know that.

They would also have to know that it concerned my belief in the veracity – my personal firm belief in the veracity of Robert Bolanos based upon my interview of him and Deputy Holman's interview of him and my belief that he was telling the truth about who committed the murder. Although he never said who did it, he always said he wasn't in there, but he described repeatedly and in detail the thumping noises he heard and the statements that Mr. Belmontes made about taking out a witness.

So I knew who did it, and I knew that if Vasquez pled guilty to second degree murder it carried a life top, and I knew that there would be no injustice in that because it's [2429] only the felony murder rule that makes him responsible for murder anyway, and because of the felony murder – well, as counsel pointed out, it's being challenged. Because I knew that I couldn't corroborate Bobby Bolanos because Vasquez never did make a statement until after his conviction regarding this offense, because Lucy Flores would not be allowed to testify because of

People versus Shirley, because Vasquez wasn't the perpetrator of this murder and because I knew that Fernando Belmontes had killed before, I chose to proceed against Mr. Belmontes.

Now, at the time Shirley was decided, there was a plea bargain offer and it rested on that sole one basis, *People versus Shirely*.

MR. SCHICK: To whom?

MR. SUEYRES: To you.

MR. SCHICK: For the record. To Mr. Belmontes.

MR. SUEYRES: To Mr. Belmontes.

After the first Shirley decision and before their modification.

Of life without parole, a plea. He refused it.

Proposition 8 came along. I wasn't in any position to offer it again. And, besides, Shirley had changed.

I mean if the Court chooses to open up this area, we're going to have to be allowed to show that the evidence they've heard against Vasquez was not the evidence that a jury would hear against him. And they would have to know that it involved some very sincere and legitimate concerns [2430] on my part to allow this plea.

And they would also have to be told that the United States Supreme Court and the California Supreme Court have endorsed judicial – I mean presecutorial discretion for these very reasons.

So I mean what are we going to do? Are we going to litigate that case for days?

MR. SCHICK: I'd like to be heard on that.

THE COURT: All right.

MR. SCHICK: I find it interesting that the primarily reason for making this decision is, number one, he feels that it might give my client, as he put it, a break to which he is not entitled. In other words, in the prosecutor's view, Mr. Belmontes may be allowed by this jury to receive a verdict of life as opposed to death. And yet the only thread upon which such an important and extremely vital distinction hangs is the fact that we might spend some more time on this case when we've already spent six weeks on it. I cannot conceive of that justification for making this distinction.

If we take that time factor away, we're left with this: Mr. Sueyres says he firmly believed Robert Bolanos, and I'm sure he does. If he believes Robert Bolanos, then Robert Bolanos was going to be a dominating witness against Domingo Vasquez. Lucy Flores' testimony added very little. But if you want to look at this case, which he has impliedly done, and analyzed the Domingo Vasquez circumstances, Robert Bolanos was a sufficient witness to [2431] convict Domingo Vasquez of first degree murder. And that's very clear, taking Mr. Sueyres' argument that was provided to this jury. They're going to be able to see, well, you told us on this occasion that Mr. Belmontes was guilty and the other people were guilty of first degree murder, yet he chose not to do so in regard to the prosecution of Domingo Vasquez. It's that very question that I don't think can be answered that causes problems.

I do not think the courts have upheld the broad sweep of prosecutorial discretion. Why is there the hint of

proportionality review? As I've indicated, it hasn't actually taken place, but why is it permitted?

I have another case here on a little different point from an Alabama court where the offer that he talked about that he made in this case is a factor that I think should be presented to the jury and, if not, is certainly going to have to be considered by this Court if we get to the point where the Court has the power and the decision-making authority under Section 1181.7 to decide whether a death verdict stands or not.

THE COURT: All right. The Court does find that the conviction and plea, negotiated plea of Domingo Vasquez, is not relevant to the inquiries with reference to penalty of Mr. Fernando Belmontes, and the Court will not allow that irrelevant material to be presented.

There is nothing in the statute to allow that evidence to be presented to the jury.

MR. SCHICK: What about the question of the [2432] plea bargain that has been conceded by the prosecutor as having been offered?

THE COURT: That shall not be presented to the jury, either.

MR. SCHICK: Could I just give the name of the case for the record?

THE COURT: Certainly.

MR. SCHICK: 369 Southern Reporter 2d Series. Cook, C-o-o-k, versus the State. And the relevant language comes about on page 1258 of that decision.

THE COURT: Thank you.

Shall we take up the issue of instructions, gentlemen?

MR. SUEYRES: I've supplied counsel and the Court with a complete set.

THE COURT: The Court shall give CALJIC 1.01, Instructions To Be Considered As A Whole.

The Court shall give 1.02, Statements Of Counsel, Evidence Stricken Out, Insinuations Of Questions, Stipulated Facts.

The Court shall give 1.10, Masculine Form Of Pronoun Includes All Persons.

CALJIC 2.00, Direct And Circumstantial Evidence, Inferences.

The Court shall give CALJIC 2.11, Production Of All Available Evidence Not Required.

The Court shall give CALJIC 2.20, Credibility Of Witness, 1980 Revision.

The Court shall give CALJIC 2.21, Witness Wilfully [2433] False, Discrepancies In Testimony.

The Court shall give CALJIC 2.22, Weighing Conflicting Testimony.

The Court shall give CALJIC 2.27, Sufficiency Of Testimony Of One Witness.

People's Instruction Number 2, pursuant to *People versus McClellan*, did you want to discuss that, Mr. Schick, or do you have any objections?

MR. SCHICK: I don't have any objections to this. I have some other things later on down the road.

THE COURT: The Court shall give People's Instruction Number 2.

CALJIC 2.90, the Court shall give, Presumption Of Innocence, Reasonable Doubt, Burden Of Proof.

The Court shall give CALJIC 3.30, Concurrence Of Act And General Criminal Intent?

MR. SUEYRES: We attempted to show a battery upon Barbara Murillo, an assault upon John Dustin and so forth.

THE COURT: Thank you.

The Court shall give CALJIC 3.34, How Intent Is Shown.

The Court shall give CALJIC 8.84, Penalty Trial, Introduction.

MR. SUEYRES: Judge, may I suggest that, while they don't follow in chronological order, that the instructions defining the various prior criminal activities be given prior to the ones speaking of the penalty phase because we're talking about two different standards of [2434] proof there.

THE COURT: I'm sorry. You want me to give –

MR. SUEYRES: It's just a matter of order, Judge.

THE COURT: Um-hmm (affirmative).

MR. SUEYRES: People's Special Number 3, CALJIC 9.00, and CALJIC 16.140, 141, 142.

THE COURT: You want me to give those before –

MR. SUEYRES: Before 8.84.

THE COURT: Yes.

MR. SCHICK: What are we changing now?

THE COURT: You want me to give CALJIC 9.00, People' Instruction Number 3, CALJIC 161.40, CALJIC 161.41, CALJIC 16.142 shall follow CALJIC 3.34?

MR. SUEYRES: Right.

Perhaps the Court should take a look at People's Special Number 3 for a moment, Judge. That involves a particular type of assault. I think the law is clear, but I don't want the Court to notice it for the first time later on.

[2435] THE COURT: I don't have any problems with People's Instruction Number 3. I think that is just a fairly –

MR. SCHICK: I don't see anything.

THE COURT: – a clear statement of the law.

So that takes us to CALJIC 8.84, Penalty Trial Introduction.

CALJIC – excuse me, People's Instruction Number 1 for CALJIC 1.00.

MR. SCHICK: We discussed that a little bit yesterday, Judge, and I read back over that, I believe it is H-o-s-l-e case that was cited by Mr. Sueyres, and it appears that the conducts which was being measured by the

Court in terms of what the prosecutor did was he said, put yourself in the shoes of a surviving victim in the case.

And as I understood the primary reason for this instruction to be introduced and the reason the district attorney wished it to corrolate with his argument was that he may in fact perhaps plans to make reference to the victim in this particular case who is deceased.

And I think there is a difference in degree there because that is another factor that's considered in a little different way in the facts and the instructions of the law. Hosle talked about a victim who was alive and not one who had been deceased.

THE COURT: I do think that the way in which the instruction is couched is a proper manner in which to present it to the jury in the sense that they are not to be [2436] swayed by public opinion or public feeling or prejudice or sentiment only when it comes into the prudent factors in mitagation and/or aggravation. And I think they can do that and it places them in a situation or a frame of mind where they can take into consideration that which was presented on behalf of Mr. Belmontes.

MR. SUEYRES: That is exactly my point, Your Honor, is that if we don't give that instruction the jury may think back to the original instruction that says don't consider sympathy, and obviously the bulk of Mr. Belmontes' mitagation case is sympathy.

THE COURT: That's right. So they can take that into consideration in the mitagation factor.

CALJIC 8.84.1, Penalty Trial Factors For Consideration, shall be given.

MR. SCHICK: With regard to that particular instruction, I think it is important that the Court make a determination as to which, if any of those factors bear upon the evidence that's been presented here. I don't think we should just read them off seriatim.

I think we should determine which ones apply, because the problem you get into otherwise the jury may look at what could be potentially mitigating circumstances saying, gee, they are not present so that makes it an aggrevated case. I think we should limit it to whatever theories each party applies to the facts elicited.

THE COURT: Subparagraph A applies, circumstances of the crime.

[2437] There is no question that subparagraph B applies, attempted force.

MR. SCHICK: Could I make one comment on subparagraph A?

THE COURT: Yes.

MR. SCHICK: Again referring to an out of state case, but it bears somewhat, the case of *State versus Cherry*, which is 257 Southern Reporter, second series, beginning at page 551 with the relevant language found at page 568.

North Carolina Supreme Court gave the opinion there that the introduction of the special circumstance again during the course of the penalty trial when it has been – when conviction for first degree murder has been based upon the felony murder rule was error in their opinion and it amounted to, in a sense, double punishment. And I would like to cite that case to the Court and ask the Court

to, read it if you are so inclined before ruling upon whether the evidence of the special circumstances should be reintroduced as the statute says under part A.

THE COURT: Well, I think the statute as far as paragraph A is concerned is quite clear. It indicates that the jury must take into consideration or – must take into consideration the circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstances found to be true. And I shall read subparagraph A as stated.

Subparagraph B, subparagraph C shall be stated.

[2438] I don't know about subparagraph D. It would appear that is not appropriate.

MR. SCHICK: Well, my only consideration, Judge, is that part of the testimony of the witnesses today is that the circumstances when Mr. Belmontes was not in a structured situation, was around his girl friend, led to pressures that he was not able to deal with very adequately. For that reason I ask it be given.

MR. SUEYRES: If he wants it, Judge, give it. If he doesn't want it I don't have any quarrel with that either.

THE COURT: All right. There was some testimony in the guilt phase also of Mr. Belmontes' emotional condition.

Subparagraph E., that doesn't apply. That shall come out.

Subparagraph A –

MR. SCHICK: F.

THE COURT: I mean F, excuse me. That does not apply.

Subparagraph G we'll give.

Subparagraph H we'll give.

Subparagraph –

MR. SCHICK: Well, there has been no evidence in that regard, Judge. I would ask number H not be given.

MR. SUEYRES: Whatever counsel wants to do.

THE COURT: All right. Will come out.

[2439] Subparagraph I shall be given.

I think subparagraph J should be modified.

MR. SCHICK: What did you have in mind?

THE COURT: Well –

MR. SUEYRES: Judge, why don't we hear what the defendant wants to do first? I mean, that really has to control.

THE COURT: All right. In light of the special findings that they made, I question commission of the offense was relatively minor. But if you want me to give it, I'll give it.

MR. SUEYRES: I think the way to approach this, Judge, is not to muck with it unless the defendant wants us to.

MR. SCHICK: Well, the relatively minor I don't think applies. I think if we were to put it whether or not

the defendant was an accomplice to the offense, period, and let it go at that. Otherwise I would ask it not be given.

MR. SUEYRES: You can't stop it in the middle. One clause modifies the other and –

MR. SCHICK: You asked me what I wanted and I told you.

MR. SUEYRES: Okay.

THE COURT: Court will not give it.

MR. SCHICK: Will not give it?

THE COURT: Will not give it.

MR. SCHICK: K, I ask it be given.

[2440] THE COURT: It will be given.

CALJIC 8.84.2, as modified pursuant to *People versus Ramos*, shall be given.

CALJIC 17.30, Jury Not To Take Cue From The Judge, shall be given.

CALJIC 17.31, All Instructions Not Necessarily Applicable, shall be given.

CALJIC 17.40, Individual Opinion Required Duty To Deliberate, shall be given.

CALJIC 17.41, How Jurors Should Approach Their Task, shall be given.

MR. SCHICK: I did ask one thing, Judge, I realize 17.40 has been tendered, but with regard to 8.84.2 as modified, I would ask that in the second to the last

paragraph after the word agree, if you can should be added as well.

THE COURT: We'll add it.

Anything further, gentlemen?

(Pause)

MR. SCHICK: Yeah, I have some proposed instructions.

THE COURT: Did you wish some time, Mr. Sueyres, to go over Mr. Schick's proposed instructions?

MR. SUEYRES: Obviously I'm going to have some comment on them, but I think he's got citations that are longer than the instructions, at least one instance, and I really – I can see that I ought to pull a few cases and read them.

[2441] THE COURT: It would appear after the Court has perused the instructions that they would be applicable. But I will allow you some time if you wish.

MR. SCHICK: Only other question I have, Judge, is with regard to the actual verdict forms. I have some requests – perhaps we can take them up when we come back.

THE COURT: That is fine.

MR. SCHICK: What I'm thinking of so Mr. Sueyres is aware, I'm going to be proposing that the Court ask the jury to make specific findings as to what the aggrevating circumstances they find specifically to be true and denominate them and they do the same thing with regard to the mitigating circumstances.

I'm also going to ask that every juror sign for the particular mitigating or aggrevating circumstances they find to be true. And the reason for my asking this, if there is ever going to be a proportionality review this information is going to be relevant.

The Court did allow special verdicts over the guilt trial over my objection because of the fact Mr. Sueyres felt it might be helpful on review, and that is my rationale here.

So I am proposing we give some specific thought as to what aggrevating circumstances he wishes to argue to the jury. And I have made a list of proposed mitigating circumstances that I would like the Court to consider in submitting the decision.

[2442] MR. SUEYRES: And have every juror sign the verdict form?

MR. SCHICK: Yes. If they are going to make a decision as serious as the one he's asking them to do, everybody should have the guts to sign the verdict form.

THE COURT: That certainly might be a unique approach.

MR. SUEYRES: When do you want us back?

THE COURT: Try 2:30. The state hospital calendar is horrendous today. I've only got six cases – seven cases, however, they look like they are very involved. They have not been involved up to today, but let's try 2:30 and –

MR. SUEYRES: I mean, obviously I'm going to have some rather long comments about some of the instructions.

THE COURT: All right. Thank you.

MR. SUEYRES: By the way, there is one more thing and as long as we have the reporter here it is appropriate.

I did not object during counsel's opening statement, but I feel that there was a very flagrant violation in his opening statement and assignment of misconduct in telling the jury that upon – they could – suggesting to them that because of his personal acquaintance with Mr. Belmontes for 16 months that – that they shouldn't give him the death penalty. And I didn't object at that time, but I just would like the Court to be aware that I plan to object if [2443] any such statement is made during closing argument.

MR. SCHICK: My purpose in bringing it up was I knew several background factors that were going to come out that hadn't come out.

THE COURT: I would order you, however, not to refer to your –

MR. SCHICK: I won't do it, but that was the purpose for it to be introduced.

THE COURT: About your personal relationship with Mr. Belmontes, I think that goes without saying that is not proper argument. All right. Thank you.

(Recess at 12:38 p.m.)

[2444] AFTERNOON SESSION

(At 3:12 p.m. the following proceedings were had in chambers:)

THE COURT: People of the State of California versus Fernando Belmontes, Jr. is called in chambers with counsel.

We have gone over the proposed jury instructions on behalf of the defendant.

The Court has read and considered Instruction Number One, and Instruction Number One shall be given as modified.

Any objections, gentlemen?

MR. SUEYRES: No.

MR. SCHICK: No.

THE COURT: With reference to Defendant's Proposed Instruction Number Two, that shall be allowed and shall be given by the Court.

With reference to Instruction Number Three, that instruction shall be given as modified.

With reference to Instructions Four and Five, Mr. Schick, I have indicated to you that the Court shall not give that instruction – those instructions.

For the record, did you wish to state your objections to that?

MR. SCHICK: Yes, Judge. My reason for suggesting Instructions Four and Five is that the current penalty law we have does not really give the jury any real

guidance as is contemplated by the *Gregg versus Georgia* [2445] case. For that reason I'm attempting to ask the Court to put the traditional standards. I suggested beyond a reasonable doubt. I would suggest possibly clear and convincing and preponderance in the absence of those. As a means of giving the jury some way to weigh the aggravating circumstances and whether or not they exist in Instruction Four, and the question of how to weigh between the two in Instruction Five.

That's my reason for giving them.

THE COURT: Thank you.

Mr. Sueyres.

MR. SUEYRES: Yes, Your Honor. Under *People versus Jackson* in 28 Cal. 3d and *People versus Frierson* in 25 Cal. 3d, Four and Five would be error.

THE COURT: The Court has determined that that is not the state of the law at the present time in the State of California, and the Court has refused to give Instructions Four and Five.

MR. SUEYRES: With respect to the defendant's special findings, I'm a little concerned that they tend to focus upon particular factors in a particular fashion.

THE COURT: I don't think there's any question of that. As well as they seem to be a little over-laden with the factors in mitigation rather than in aggravation.

MR. SUEYRES: There's none here that relates to circumstances concerning the crime. I can't conceal the [2446] fact that I think that is the determinative factor in this case. That's my personal view.

MR. SCHICK: I am the proponent and certainly I did so with the idea in mind that certain factors were emphasized by my evidence and by the evidence that was produced at this penalty trial. I understand Mr. Sueyres' position that he would want to add the extra factor about the circumstances of the crime and whatever. And we had a discussion about my objections to that earlier today.

I have proposed these as some factors that I feel exist with the idea that we might be able to discuss and come up with them. Because I feel some guidance – my concern is that there's going to be no way, if there is a verdict of death, no way in which the jury decision can be evaluated, and the guidance that the courts hopefully need in making that decision is going to be absent. We're going to be stuck with people who do not have to say anything more after their decision has been made, and there is going to be no way of evaluating it.

THE COURT: I think it would be very helpful for us to have some findings by the jury. But I don't – I just don't see how we can possibly make a determination as to which of the findings should be presented to them. They are numerous, both in mitigation, as well as in aggravation, and to try to couch it in A through Z would be a very difficult procedure. Because of that – and I don't think it should be limited to that. Perhaps in the future that [2447] will need to be done, but at this stage I don't think we should do it as proposed.

The Court will not allow that.

MR. SCHICK: Could I make those part of the record, Judge?

THE COURT: You certainly can.

MR. SUEYRES: Has counsel had the opportunity to view the proposed verdict forms I submitted to the Court?

MR. SCHICK: No.

THE COURT: I have them here.

The proposed jury instructions by the defendant, those that have been refused, as well as the proposed jury instructions with reference to the findings concerning aggravating factors and mitigating factors, shall be made part of the record as if set out in full.

MR. SCHICK: I have no quarrel with the verdict forms, except, as I previously indicated, Judge, I do feel that the verdict should be signed by each individual juror.

THE COURT: That request is denied.

MR. SUEYRES: Judge, if I can have –

THE COURT: Five minutes?

MR. SUEYRES: Yes.

(Whereupon the following proceedings were had in open court, in the presence of the jury, at 3:26 p.m.:)

[2448] THE COURT: The record will reflect the jury is all present and accounted for, the defendant is present, we are now ready to proceed with rebuttal testimony.

Mr. Sueyres.

MR. SUEYRES: Yes. We'd call Mona Terrell.

THE COURT: Mona Terrell, please.

Mrs. Terrell, would you come right up this way, please. Come right up through the swinging gate, if you will. Come right over here by the court reporter. We ask that you raise your right hand, and the clerk will swear you in.

MONA TERRELL,

called as a witness for and on behalf of the People, having been sworn, testified as follows:

THE COURT: Right up here, if you will, please.

We'd ask that you state your full name for the record, spelling your last.

THE WITNESS: Mona Terrell, T-e-r-r-e-l-l.

DIRECT EXAMINATION

BY MR. SUEYRES: Q. Your occupation?

A. Probation officer, San Bernardino County.

Q. Were you so employed in March of 1979?

A. Yes, sir.

Q. Did you have occasion to talk to a Fernando Belmontes in that month?

A. Yes, I did.

[2449] Q. And the purpose – excuse me.

The purpose of your interview related to court proceedings?

A. Yes, sir.

Q. All right. Did you have occasion to speak to Mr. Belmontes on the subject of religion, or did that come up?

A. It came up during the interview.

Q. All right. What did he tell you about that?

A. He said that a couple of months ago a friend had turned him on to Christ and that he had been attending the Soldiers of Christ Church a couple of times a week and that he was working there, also, sometimes during the day. And that – I think one of the quotes was that his only weapon is a Bible.

MR. SUEYRES: Thank you.

I have no further questions.

MR. SCHICK: No questions.

THE COURT: Mr. Schick? No questions? That was a long ride.

THE WITNESS: It was.

THE COURT: Thank you very much for coming. I appreciate it very much.

Anything further, Mr. Sueyres?

MR. SUEYRES: We rest.

MR. SCHICK: No surrebuttal.

[2450] THE COURT: Ladies and gentlemen, you have heard all of the testimony you are going to hear with reference to the penalty phase of this particular proceeding.

What we are going to do is now we are going to allow counsel to argue the matter before you just as we did in the penalty phase.

Once again, I admonish you what they have to say is not to be considered by you as the evidence presented to you. You are the triers of fact in this matter. You have to decide what the evidence has shown.

We are going to have somewhat of an unusual proceeding in that the Court is going to allow Mr. Belmontes also to argue his case. I have granted Mr. Schick's motion to appoint Mr. Belmontes as his co-counsel, and he is going to offer an argument to you on his behalf. What Mr. Belmontes has to say to you is not to be considered by you as evidence, only what he thinks the evidence did show.

Once we conclude the statements of counsel and Mr. Belmontes, I'm going to instruct you on the law. We will then recess until tomorrow morning at 9:30, depending upon where we go. I don't think I want to send you out for deliberations this evening. And I will ask you return to this courtroom at 9:30 in the morning. Take the roll if everybody is here and send you out for your deliberations tomorrow so you won't have to come back on Friday.

Mr. Sueyres has indicated he will stipulate to the fact he will not have to be here when you are sent out for [2451] deliberations due to his wife eminent birth giving process. So Mr. Sueyres, you may proceed.

MR. SUEYRES: Thank you, Your Honor.

Ladies and gentlemen of the jury, let me caution you as I have each time I've spoken to you that what I say is neither evidence nor law. It is intended to help you. If it doesn't help you you are to reject it.

But we've approached the stage of the case that none of us really wanted to come to. The task before you is really awesome. Mine's done. I'd ask you to listen carefully as you have throughout the trial, and I'd like to thank you, to that and to the instructions that the Judge gives you. Again, I'd like to talk about those for just a moment to tune you up to what you will hear and so you can avoid confusion, hopefully.

After I talk about the instructions, I want to say just a brief word about the task you face. And then I'd like to talk about the factors which you will be weighing one against the other in making your decision.

I would like to point out that at this stage of the proceedings there is no burden of proof with respect to which side has to prove aggrevating or mitigating circumstances, though there is a burden of proof with respect to prior criminal activity and I'll discuss that later. Where there is no burden of proof that means that the People, this side of the lawsuit, are not given an extra argument. That means I have one opportunity to address you. This is it. And then the defendant and his [2452] attorney will have a word for you.

With respect to the instructions, you're going to be given many of the same instructions that you had before. There are really only a couple of changes. The first is that in this listing of aggrevating and mitigating circumstances which you are to weigh one against the other, there is a proper place for sympathy and passion.

In other words, at the guilt phase you were told the Judge gives us the law but you are the judges of the facts. At this stage of the proceedings you are not only the judges of the facts, you decide how much they weigh. And

in weighing them, it is proper and it is necessary to take into account factors that impinge upon anger and sympathy and so forth.

Let me tell you what that doesn't mean, if I may. Your regard for Steacy McConnell's family, mean no one, no one can deny sympathy for them, no one. But that is not the kind of sympathy the instruction tells you to consider. It says as sympathy or passion naturally arises or properly arises from the factors in aggravation and mitagation. Okay.

And again, sympathy for the defendant's family. He has a mother. We all have a mother. We can't help but feel that pang of human emotion for her. We would be less than human if we did or if we didn't. But the point is, that isn't one of the factors in aggravation. That's – I just wanted to caution you on that instruction. But it is different than the guilt phase when sympathy was to play no [2453] part at all.

The other concerns the burden of proof. Let's be very careful. You will get an instruction concerning burden of proof beyond a reasonable doubt here. And it relates to a certain of the factors in aggravation. I keep talking about these factors, and I'll tell you what they are later. But for this purpose, there is one of them that involves prior criminal activity. For example, I'll list them for you.

There was the assault on the other ward at juvenile hall. There was the battery of Barbara Murillo. There was the, what we call conditional assault, and I'll explain that to you later on, Rudy, when his gun was taken. And there was the implied threat to use deadly force that Mr. Steve Cartwright talked about when the defendant said he was carrying his protection with him. And the courts – and the

rule is that you can't use any of that against the defendant unless it is proved beyond a reasonable doubt.

In other words, in affect, that testimony accuses him of other crimes and it wouldn't be fair to hold that against him unless it was proved beyond a reasonable doubt, okay? And we talked so much about it before I'm not going any further in talking about it. But I will say this: With respect to each of those incidents, for whatever they are worth, and that is for you to decide, I don't think there is any question that they were done and they were done as they said. No one, no evidence contradicted Steve Cartwright. As a matter of fact, the defendant, as I [2454] recall, said it had occurred, this conversation with Steve Cartwright had occurred.

And nobody, nobody has testified contrary to Barbara Murillo.

Nobody has testified contrary to William Cartwright when he describe the incident with Rudy.

There is nothing contrary to Mr. Ron Cutlar's testimony. So all those incidents are proved beyond a reasonable doubt.

It is a matter of, what does it add up to? How much does it weigh? I mean, if your job is to weigh one against the other what they weigh and – is a little different question and we'll get to that in a moment.

Finally on this issue of instructions. The burden of proof at the penalty phase and the burden of proof for these prior criminal acts is beyond a reasonable doubt. For your purpose here, there is no burden of proof. It is not up to one side or the other to prove he ought to die or that he ought to live. It is a simple weighing which and there is no

other word for it really, which way do the scales of justice tip? That is what it is all about.

Now, the factors for consideration will be read to you, and I'd like to mention them briefly now and then talk about them a bit. Excuse me, there is one thing I wanted to mention and that is the task you had at hand. That was the second part in this.

I've told you that you have to – that what it is is weighing it back and forth. Let me tell you what your job [2455] isn't. Your job is not to talk about whether the death penalty is proper, whether it is legal, whether in another society or another world we would have it another way. Your duty is to follow the law as the Judge gives it to you and I know you will do that. All right.

Now, I'd like to talk about those factors. The Court will tell you that you may take into account, and he'll read them in their entirety but let me just run through them quickly, the circumstances of the crime for which the defendant has been convicted.

Now, let us be careful. The fact of his conviction which you found is not a factor. In other words, that would make it automatic that somebody got the death penalty. If you just said he's been convicted of first degree murder, therefore, automatically he gets the death penalty. No. No. But the circumstances of how he did it and what exactly he did, yes, that is a very proper subject of consideration, and I believe the most important one for you, but I will talk about that later.

B or the next one, the presence or absence of criminal activity involving force or violence. That is those four incidents I was talking about where the witnesses talked

about the weapons and the battery and assault. That's another factor to weigh.

The next one is the presence of a prior felony conviction. There has been a prior felony conviction for concealing evidence of a felony with the intent that should not be discovered. Okay.

[2456] The next one is whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. And I think the key here is extreme mental or emotional disturbance. So, for example, had he, in his beating of Barbara Murillo, killed her and come to this point in the proceedings, assuming it was possible, all though let me tell you it is not, have it come to that point, you know, his emotional upset at her, any of us that have been married and any of us that have a brother or a sister, any of us who have anyone close to them know that somebody close to you knows where those buttons are in you that make you react and knows how to get to them whether they mean to or not. And that emotional disturbance is a consideration that should be given a man in deciding, weighing back and forth whether – what penalty he should receive. I'd like to come back to that one in just a moment because there are several that we will consider together.

[2457] MR. SUEYRES: The next one, whether or not the defendant acted under extreme duress or under the substantial domination of another person.

Extreme duress means essentially that somebody was forced to do something. You see, in the law, the law is that if a man puts a gun to your head and says rob a store and you do it, you're not guilty; you were forced to do it. If he puts a gun to your head and says kill someone else and

you do it, the law says no, that does not excuse your conduct because taking another human life is too serious. There's no legal excuse there. So we have this instruction that says if you have duress that doesn't amount to a legal duress, at least it can be considered by the jury at this proceeding.

Of course, under the substantial domination of another person, I'm sure you can imagine what kind of a situation in which that might arise. Somebody telling a younger brother or a wife go do this.

The next factor is the age of the defendant at the time of the crime.

And finally a catchall, really a catchall, any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime.

Okay. What I'd like to do is to talk about these factors. By the way, these factors are either aggravation or mitigation as you find them to be. So, for example, the defendant may well say I was only 19 when this happened or the attorney may say he was only 19 and when you're young [2458] sometimes you make mistakes, mistakes that you would never make if you were 29 or 39. And that sort of thing must be taken into account. When you are young, your judgment isn't right or isn't mature or developed.

On the other hand, however, it's common experience that when you're young people are idealistic, altruistic, they believe that anything is possible, that people love one another or that everything is good or all is good for them and that as they age, a cynicism creeps in. Maybe that's too strong a word. A hardening, maybe. And that it doesn't

always necessarily mean that you're a better person when you get older.

Going the other way around, it doesn't mean you're a better person when you're younger, either.

All I'm saying is that I think the age of the defendant goes both ways, really.

All right. With respect to these others, I suspect that you will be told – I can't imagine that you won't be told that the defendant's religious experience is within that catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime.

I'm not sure it really fits in there. I'm not sure it really fits in any of them. But I think it appears to be a proper subject of consideration.

Let's talk about it for a moment. You know, first of all, it's no secret that the evidence upon which the defendant's religious experience rests is somewhat shaky. Not that the people who talked about it weren't sincere. I [2459] don't mean that for a moment. But that we have come to know Mr. Belmontes in another way, a way that he never showed those other people, a way that, for example, Mr. Haro can't even conceive that he would act. Can't conceive of it. And yet we know, we know with certainty that he's not the person or not always the person that Mr. Haro knew in his home.

So when Mr. – or Reverend Barrett or – I think Mr. Miller was a little more acute in his evaluation of Mr. Belmontes. When they say he had a genuine and sincere religious experience, I think we have to take it with a grain of salt. He had one in 1979, at the time he was arrested or going through the court system. He had one

when he was in the youth authority, again with some very obvious nonreligious benefits attached. He obviously has one – has other benefits by this experience now. So I think we have to take it with a grain of salt.

In any event, that's not to say that people can't be of two minds, that, you know, stones have different facets. You can see one side of them and see one and look to the other side and it's different. But it's all one stone.

All right. In any event, is a religious awakening a basis for determining penalty? That's really the issue, how much does that weigh, or does it weigh on one side or the other.

All right. I suppose you can say it would be appropriate because – in this fashion: The defendant may be of value to the community later. You recall the people [2460] talking about how he would have the opportunity to work with other prisoners in prison. And I think that value to the community is something that you have to weigh in. There's something to that.

On the other hand, the fact that someone has religion as opposed to someone doesn't should be no grounds for either giving or withholding life. I mean let's turn it around and look at the other side of the coin. Suppose someone said he didn't belong to a church and didn't talk to a minister. Would that man deserve to die merely because of that? So if he says he has religion, does he deserve the other penalty, life? I don't think that that should be an influencing factor at all in that respect. I don't think the law contemplates that and I don't think it's right.

And I think, you know, it goes without saying that while this country is made up of religious people and was founded by men of religious persuasion, the task you have before you is completely secular or to be determined without reference to religious beliefs.

And I don't mean to imply, either, that you can't individually seek the guidance of your maker in making your decision. I think that's entirely appropriate, too.

I think the defendant may suggest to you that – or it may occur to you that because he is a very intelligent person – and he is. With almost a philosophical turn to him, something that is not particularly common in court. I don't think that that is a factor to be weighed either way [2461] because it goes both ways. We could infer that he knows better than most what he was doing. On the other hand, it doesn't mean he's particularly valuable. It's the way that intelligence is put to work, I think, that matters.

[2462] MR. SUEYRES: Or that he is particularly likeable is a fact, because, I know his family is attached to him. We all heard that. I don't think that that matters one way or the other. Some people tend to be more quiet or more morose or something. You can't decide something like this based on personality. That is not right.

I think you will hear that you should consider life based upon some lingering doubt concerning his guilt. You've heard all witnesses who just find it impossible to believe that he would be guilty or guilty exactly as he was guilty, you know. And I suppose if you had a lingering doubt that would be a factor to weigh. Certainly it might be.

But I think after hearing the evidence, especially as time has passed, you know, the conviction grows stronger as each minute passes, and there is no lingering doubt on this.

He can't suggest to you he feels remorse, because ladies and gentlemen of the jury, that is the one thing that we have never heard, that he is sorry. As a matter of fact, the only emotion, the only genuine emotion that I saw, and I think you saw, came during his cross-examination on the guilt phase when he expressed anger at Domingo Vasquez for standing and staring in shock instead of picking up the stereo. So there is no remorse. No thought of Steacy.

I think you'll be told that Barbara Murillo and the defendant's mother were bad influences, and that that extenuates the gravity of the crime or induces an emotional [2463] disturbance or distress. This is the one I said I was going to come back to. Somehow between the two I think we can justify considering that his girl friend was a bad influence. And somehow, somehow, his mother must have failed. But he's old enough that he has to take responsibility for his own actions, and he told you that. He can't use that as a crutch. I give him that credit for recognizing that.

Can we really say that – that our choice of penalty and what justice demands is substantially changed by the fact that he was living with Barbara up until three weeks before the offense or that he didn't have a father in the home? That he had picked bad companions? My recollection of the evidence is that it appeared that he was the leader of the band rather than vice versa.

Going on, what about the other side of the coin? I mentioned age and I mentioned some other things. The

fact of his prior criminal activity. Look, let's be straight forward. The prior criminal activity has been described to you on the stand isn't great, you know. People get into fights with their wives, not all of us and not to that extent, but, I mean, it is nothing so serious that it outweighs the others. Or the fact that he took a gun and committed what we call a conditional assault. That is, he said – let me talk about assault for a minute. Assault is a swing and a miss. A battery is a swing and a connection.

A conditional assault is where you hold up your fist and you say, get out of here or I will hit you. And if you [2464] have no legal right to tell somebody to get out of here you have committed assault in threatening to use that force and having the present ability to apply it.

So with respect to the gun, Rudy's gun, you know, taking the gun and sliding the bolt and pointing the revolver implies, you let me keep it, something I'm not legally entitled to do, or I use it on you. So that is a conditional assault.

All right. So these things, they really, they don't show that the defendant is such a horrible person that the ultimate penalty must be imposed. But what they do show is that other side of the stone. Somebody once described it to me this way: You take a large rock, it is like a river washed rock and it is smooth and you crack it open. One side is smooth and the other side is rough, and yet it is the same rock. What we have done is showed you the other side of Fernando Belmontes.

And the way I add it up is all the things I've talked about so far wash out. Well, come up a draw. There is nothing really pointing one way or the other in the case to this point.

Then we come to the circumstances of the crime, okay. I had forgotten to mention the prior conviction of accessory after the fact of voluntary manslaughter. Put that in there, too, still a wash. Come to the circumstances of the crime. Excuse me just a minute.

(Pause)

I'm going to ask you have a little patience with me [2465] for a moment. I'd like to read you something that was written by an 18th Century poet, and minister, just a couple of sentences in connection with the circumstances of the crime.

No man is an island unto himself. Every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less. As well as if a promontory were, as well as if a manner of thy friends or thy own were. Any man's death diminishes me because I am involved in mankind.

Somehow that captures the precise problem that you have, is that you can put yourself in that man's place and imagine and sympathize with what he's going through. But that is exactly why we are here in this way, is that he could not put himself in Steacy McConnell's shoes. Now, you need not decide the whys and the wherefores in order to reach a verdict, but I tell you, that is where it is.

In our system of law it is a central theme that punishment must be proportionate to the crime, the crime and the factors concerning the offender here that we've already talked about.

One scholar put it this way: Punishment is the way in which society expresses its denunciation of wrongdoing.

And in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them.

Another man put it this way: The purpose of law is [2466] not merely to control behavior. Even a tyrant can control behavior. But it is also to promote respect for that which should be respected. For example, human life.

A dreadful crime requires a dreadful penalty, not in the sense that that penalty must be awful. Not in the sense of painful, but in the old sense of commanding profound respect and reverential fear.

Ladies and gentlemen of the jury, I've told you that as we assess these factors they're a wash until you get to the point when you consider the circumstances of the crime itself. And when you look to that circumstance, to that cold and calculated decision to take out a witness for personal convenience – and he could have turned and walked away. When after struggling with her he decided to hit her. When after hitting her once he hit her again. We have a situation in which he could not put himself in Steacy McConnell's shoes. He thought only of himself.

[2467] MR. SUEYRES: I believe that it is entirely appropriate that after you stand in Mr. Belmontes' shoes you stand in Steacy's and you say to yourself if law is a moral statement, if punishment is to engender respect for law and proper behavior, what is the appropriate penalty for what happened to that young girl? How do we tell the world that nothing excuses what he did? How do we tell the world how awful that crime was? We tell the world, we answer justice really, not individuals, but

justice, and our oath, by an awful penalty, one commanding reverence, fear and profound respect.

As I indicated to you, this is my only opportunity to speak to you.

I haven't gone through all the testimony and what the various witnesses said. You listened too carefully for me to see the need to do that. I'm sure during the course of your deliberations, if not during the argument of counsel, various and particular points the witnesses mentioned will come up. I ask you to think carefully about the point that is raised by yourself or others and the countervailing points.

You're not to line up on one side of the other, of course.

I wish to thank you very, very much for your attention.

I wish to thank you very, very much for the considered deliberation that you will go through and your verdict, however it is.

THE COURT: Thank you, Mr. Sueyres.

[2468] Mr. Belmontes.

THE DEFENDANT: I ain't much on speaking, but I'd like to tell you a little bit about how I feel about all this, about the things that Mr. Sueyres has said about me, about what he thinks about me.

He sat and told you – or stood and told you about how to judge other people on what they believe I've done or said I have done. Mr. Sueyres himself, he's only giving you his point or what he thinks that I'm guilty of doing or my position in this whole crime.

You've heard my parents – or my mother, my grandfather talk about my childhood, that it wasn't a very good childhood.

I can't use that as a crutch to how I am right now. A lot of people have had rough childhoods and come out a lot better than I have. I realize myself that once I got old enough to know right from wrong, then it was my decision on how I wanted my life to be. So, you know, I can't really say it's on my childhood or how I was brought up or things I didn't have or things I did have. A lot of people are like that.

You've heard people up here talk, Reverend Barrett, my M-2 sponsors, Mr. Miller, talk about my involvement in church with them, how they know me.

It's true that while I was with Bev and Fred that I did see a different life, a life that I've never seen before, and I wanted to be like that, I wanted to change my life and see how it was. I tried. Like I said, it's a lot [2469] easier to do while you're in jail because you have a lot less pressures.

When I did get out, when I did go to a Christian home and I wanted to stay and become a Christian and keep my life the way I felt it was, I guess I couldn't deal with the pressures out there. Like I say, it's a lot different.

I'm not coming here and saying right now that I'm a full-fledged Christian or a born-again. I was born again and I still feel the same way, but I'm not using that as a crutch, also. But it is something that I tried and I really believe in.

As for the verdict right here that you're going to deliberate on right now, I myself would like to keep my life and not really lose it in the gas chamber.

Mr. Sueyres has stated that he does not feel that I have remorse. Mr. Sueyres does not know. He hasn't been sitting in the county jail for 17 months. Mr. Sueyres was not there that day.

Mr. Sueyres has told you that I'm the actual killer. He does not know. He wasn't there. He's only going on what he thinks happened that day.

I have thought a lot about it.

He says I can't put my feet in her shoes. It's true, I can't. I didn't go through it. I wasn't the one who was actually killed. But he hasn't had to sit and think about actually getting put in the gas chamber or life without imprisonment (sic). I'm not saying I didn't do it or wasn't guilty. Like I said, I was involved to a certain [2470] extent. I have to pay for what's happening – for what happened, and I can deal with that. You know, there's only two choices right now, life without the possibility or the death penalty. Both of them ain't really – isn't really any good. There's always the possibility that while you are living with life without the possibility that you will die in there. You can't really say. Things happen.

But there is an opportunity to achieve goals and try to better yourself. Mr. Sueyres has indicated that he feels that I'm a little bit shaky in my walk with the Lord. He doesn't know this, he doesn't know what I've been through, he hasn't been in my shoes.

He stated that my mom has failed. My mom never failed. She did the best she could under the circumstances. We can't blame her. I can't blame her.

I can't blame Barbara. We've had our problems. I don't deny hitting her or getting in an argument with her.

But everybody goes through problems in their lives. I'm not just the only one who has done this or been involved in something like this.

I don't have hard feelings towards you, the jurors, for the verdict you brought back, I don't have no hard feelings toward the officers who investigated the crime, toward Mr. Sueyres or toward the family. They obviously want me to go to the gas chamber. I don't have hard feelings towards them. They have done their job and you have done your job, also. It's just something that has to be done. But I myself would really like to have my life [2471] and try to improve myself.

Mr. Sueyres has said that I stood up there and hit Steacy once and then hit her again. I didn't think about myself. Again, he wasn't there. He doesn't know that I actually hit her the 20 times like he says I was. This is his belief.

I'm not no professional lawyer or nothing like that, but I'd like you to also think about how he is. He's going by what these people think about me, how they know me. He doesn't know me. He's never been past being the D.A. in the case.

He's indicated to you that I'm supposed to be a potentially violent person. He doesn't know that. Things come up in everybody's life to where they have to be involved in some things one way or another.

I just ask that you think about this a lot and give it a lot of thought as to the verdict on this penalty phase.

That's it.

Thank you.

THE COURT: Thank you, Mr. Belmontes.

Mr. Schick.

[2472] MR. SCHICK: Ladies and gentlemen of the jury, we're here to decide a question of life and death, because the law does permit it. The things Mr. Sueyres talked to you about the law, the aggrevating factors, the mitigating factors are an attempt by the law to give you some guidance as you go in and deal with this very enormous and very difficult question you are going to have to consider.

We've taken a moral question, a subjective question, and tried to give it objective dimensions. And I don't mean to try and give you fancy language, but we are trying to say, can you take all factors, A, B, C and D, can you put them on one side and say they aggrevate the circumstances or put them on one side and say they mitigate the situation and come up with a decision based upon that. And that is not easy to do, and it is not going to be easy for you to do.

Mr. Sueyres has told you that in his view the primary and the overriding consideration in terms of his analysis of the case is the way in which the homicide occurred. And there is no getting around the fact that what happened in that homicide was not pleasant. There is nothing that can be done to change that. Those factors have already been presented to you in great detail. I'd just like you to remember at the time you weigh that, if that becomes – as you've been asked to, that becomes the sole and primary determinate upon whether you decide Mr. Belmontes spends the rest of his natural life in prison or whether he goes [2473] to the gas chamber, to consider the argument you were given at the time of the guilt trial and the

evidence that was produced, it was never suggested that the reason for going there was to kill this young girl. It wasn't to take away her life.

The evidence, as theorized by the district attorney in his final argument to you, is that something went wrong inside and a quick remedy had to be taken and things progressively and steadly got out of control.

I'd like to comment about the evidence that we've presented and what Mr. Sueyres told you he thought it means, and I'm not going to insult you by telling you I think it excuses in any way what happened here. That is not the reason I asked these people to come in.

I don't think I could put it any better than Reverend Barrett did in his testimony on the stand to you folks. He said, I've known this man for over a year and I have some insight in him you folks don't have. You've only been here to hear specs and dots along the line that makes up Fernando Belmontes' life. You've only been allowed to see certain aspects of that life, and undoubtedly a very prominent aspect of what happened on March 15th, 1981. But you can't possibly know and you can't possibly make a decision about a question as important as the one we face unless you know something about the man. And that is the total purpose of the witnesses who came in.

I don't suggest to you that the absence – the presence of religion in itself is a totally mitigating [2474] factor either, but what does it tell us? We talked to all of you at great detail and great depth when we voir dired you and I know many of you have very personal, strong and religious beliefs and they are part of your valued system. And that is a very, very vital function religion plays in anybody's life and why it is an extremely important part of our society is

that it does help to create and to promote values, the values that human beings find by which to live their lives.

And while Mr. Belmontes has told you he is not going to use a crutch for what happened in the first part of his life, I'd like to suggest to you until he got to know Beverly and Fred Haro, until he saw a kind of the life that most of you and I have had the opportunity to live growing up, he didn't really know, he didn't really have the sense of values that a human being, a young man about to embark upon adulthood should have. And that is what his experience with Reverend Barrett and Beverly and Fred Haro in that time he was there in their home while he was in the California Youth Authority meant.

And talking about their beliefs and their feelings about what happened afterwards, and again trying to lay the blame at Barbara Murillo, as I admit I hinted at in the testimony, does not excuse the activity either. But it has to give you an idea as to what happened, because ladies and gentlemen, if you don't have any idea whatsoever as to how something like this can come down, as to how the facts you've heard unraveled in front of you can happen between [2475] two human beings, two of the most valuable entities we have can occur and end up the way the facts did in this case, you're not going to be able to make that determination.

And what I am suggesting to you and what I hope the evidence suggests to you is Fernando Belmontes cannot make it on the outside. I think it is pretty clear from the experience that he had inside, the kind of development he undertook, the kind of experiences he had with the Haros as compared with his being placed out on his own.

You remember Mr. Miller, how he testified to the difficulty people even have in ordering a meal because they are so used to having things done for them. Again we are not saying this is an excuse, but you have to understand the problems that people have in dealing with their lives. The problems that Mr. Belmontes had as people slowly drifted away. Barbara Murillo was gone. He was there on that weekend with people he really didn't know very well, Mr. Bolanos and Mr. Vasquez. He was falling down.

Remember Beverly Haro when she testified when she saw bash Fernando Belmontes with Barbara Murillo, he was up here and she was down here. One would hope the process would elevate her, but that is not what she observed, he gone down to her level and that is exactly what happened with these other people.

We are not talking about pinning medals on anybody or putting people at large. We are down to a very narrow set of choices, and given those choices I think it is proper to consider punishment. I firmly believe in the concept of [2476] punishment, and I think anybody who is apparent cannot get by without that belief, without that ability to handle the guidance of your own children as they grow up and need to be contributing members of our society. But let's assess punishment. Let's assess what it means in this case.

Punishment is one of two choices. Consider, if you will, a young man who is 21 years old, Mr. Belmontes. I'm not an actuary, but let's assume he has 50 to 55 years left of his life. Fifty to 55 years from now I dare say many of us won't be here, but a sentence of life without possibility of parole means that for every day, 24 hours a day, seven

days a week, 365 days a year he will be without that most precious commodity that we have, freedom. You will punish him far greater and for a far more significant impact upon his life by sending him to prison for the rest of his life.

You've probably heard about people in a position of being on death row asking for execution. You all remember the Gary Gillmore charade a few years ago, prisoner in Utah who wanted to be killed. There are some people who feel that way because they can't deal with it. It is easier to die than to face that possibility. It is easier to die than to face the possibility of never, ever having your freedom and totally being at the command of other people. Doing what you are told.

If you want to impose, and I think you need to impose a punishment. This young man needs to be punished. I'm not going to tell you that isn't a truth. But if you want [2477] to impose a punishment upon him that has meaning, that has teeth in it, send him to prison for the rest of his life, however long that may be. Because when you analyze it, when you stop and think about that other option, about the option of death, why do we decide to kill people as a society? We justify it in war. Certainly nobody has quarrels with that. Sometimes there are people who are conscientious objectors and they have feelings about that and those are legitimate feelings. But aside from that nobody opposes that concept of killing other people.

But how do we feel? How do we justify it? How do we justify taking another of God's creatures by killing them? We dehumanize the other people. Look at the Vietnamese war. We weren't fighting Vietnamese. We were fighting Gooks. Look at the Japanese war, we called them Wops

and Japs. World War 1 we fought the Huns. We made it possible in our mind to dehumanize these people so we could go out and kill them and not feel guilty about it.

That is exactly what we must do and what you are being asked to do in evaluating the life of Fernando Belmontes. You are being asked to look at him and say to yourself, this man is not a human being. He has committed such an atrocious act he is without any redeeming characteristics. He has nothing within him that I can look him in the eye and say, that is a fellow human being, a creature of God as much as you or I. You must be able to do that, to go through that process of dehumanizing him in order to kill him. And ladies and gentlemen, that is exactly what the [2478] evidence I produced at this penalty trial has shown.

[2479] MR. SCHICK: This young man stands convicted by your decision, a decision he has indicated he lives with, a decision I live with as his attorney. But, ladies and gentlemen, he has not been proven to be dehuman.

The people who came in here told you about him. They told you not only what they know of him, but they gave you, as best they could, under the very difficult circumstances of somebody looking at the rest of their life in prison, a game plan, something he can do with his life, something he's been able to do. We're just suggesting the tip of the iceberg because who knows in 20, 30, 40, 50 years what sorts of things he can do, as he fits into the system, as he learns to set his goals, to contribute something in whatever way he can. I'm only trying to suggest something because it's difficult for any of us to conceive of such a harsh penalty as life in prison without ever being released.

And it is harsh. You remember during voir dire you were asked to compare these two penalties. I think it was constantly referred to as life without possibility as being the more lenient of the two penalties. Well, to the extent that Mr. Sueyres believes Mr. Belmontes should die, I suppose it is lenient.

But I ask you to consider this: Aren't you really imposing a severe, a harsh and a deserved punishment by sending him to life without the possibility of parole?

Thank you very much.

THE COURT: Thank you, Mr. Schick. Ladies and gentlemen, I think – because of the [2480] emotional aspects of this case, I don't think I'll instruct you tonight. I'm going to ask you to come back in the morning at 9:30. In the event that I am not through with my 8:45 calendar at 9:30, I will recess that 8:45 calendar and instruct you at 9:30 promptly.

If, as you have noticed in the last couple of days when you've been here, I'm still going, just come into the courtroom, and as soon as the bell tolls 9:30, I will recess, you'll take your places, and then I will instruct you in the law.

Mr. Sueyres will not be with us tomorrow morning.

I will need a stipulation from Mr. Sueyres to allow me to read the instructions with someone from your office present.

MR. SUEYRES: Yes, Your Honor, that's fine.

THE COURT: Very well.

Tomorrow morning at 9:30.

Thank you.

(4:30 p.m.)

Case No. 32183 No. 22 810

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

– – – o0o – – –

Appeal from the Superior Court of San Joaquin County
HON. WILLIAM R. GIFFEN, Judge

– – – o0o – – –

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, vs. FERNANDO BELMONTES, Appellant.	VOLUME IX (Pages 2,481-2,565)

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES OF COUNSEL:

For the Respondent: GEORGE DEUKMEJIAN,
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For the Appellant: In Propria Personna

[2481] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	No. 32183
vs.	)	Dept. No. 7
FERNANDO BELMONTES,	)	
Defendant.	)	

The above-entitled matter came on regularly for hearing on Thursday, August 5, 1982, at the hour of 9:34 a.m., before HON. WILLIAM R. GIFFEN, Judge of the Superior Court of the State of California, for the County of San Joaquin.

REPORTED BY: VICKI MARIE HAUNER, C.S.R. No. 4098 and JOHN SQUIRES, C.S.R. No. 2001

[2482] APPEARANCES OF COUNSEL:

LEE SHATTUCK and GERARD WALL, Deputy District Attorneys, Courthouse, Stockton, California, appeared as counsel for and on behalf of the People.

JOHN SCHICK, Attorney at Law, 2027 Grand Canal Boulevard, Stockton, California, appeared as counsel for and on behalf of the Defendant.

– – – o0o – – –

[2483] (Whereupon the following proceedings were had:)

THE COURT: People of the State of California versus Fernando Belmontes is called for further jury trial.

The record should reflect jury is all present. Defendant is present. All parties are present and we are ready to proceed.

Ladies and gentlemen, I will now read to you the instructions that apply to this part of the proceedings. Some of the instructions which I will read to you you have already heard in our previous proceedings but they still apply to the evidence that was presented to you in this proceeding.

I'm required to read these instructions to you here in open court. You may have them with you during your deliberations once again. Those instructions that have been modified or there have been some deletions you are not to surmise as to what those deletions are nor are you to try and figure them out or try to read where I've scratched out some words.

As jurors you have two duties to perform. One duty is to determine the facts from the evidence received and not from any other source. The word fact means something that is proved directly or circumstantially by the evidence or by agreement of counsel. Your other duty is to apply the rules of law I state to you to the facts as you determine them and in this way to arrive at your verdict.

[2484] It is my duty in these instructions to explain to you the rules of law that apply to this case. You must accept and follow the rules of law as I state them to you.

If any rule, direction or idea in these instructions is repeated or stated in varying ways, no emphasize is intended and you must not draw any inference because of

its repetition. You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which they are given has no significance as to their relative importance.

Statements made by the attorneys during the trial are not evidence; however, if counsel for the parties have stipulated to any fact, you will regard that fact as being conclusively proved as to the party or parties making the stipulation.

A stipulation is an agreement between attorneys as to matters relating to the trial.

As to any question to which an objection was sustained, you must not guess as to what the answer might have been or as to the reason for the objection.

You must never assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

[2485] You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you had never heard it.

For sake of convenience, the masculine pronoun is used in these instructions and applies equally to all persons.

Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence which directly proves a fact, without the necessity of an inference, and which by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

[2486] Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness you may consider anything that has a tendency in reason to prove

or disprove the truthfulness of the testimony of a witness, including but not limited to any of the following:

The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

The ability of the witness to remember or to communicate any matter about which the witness has testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or nonexistence of a bias, interest, or other motive;

Evidence of the existence or nonexistence of any fact testified to by the witness;

The attitude of the witness toward the action in which testimony has been given by the witness or toward the [2487] giving of testimony;

A statement previously made by the witness that is consistant or inconsistent with the testimony of the witness;

An admission by the witness of untruthfulness;

The witness' prior conviction of a felony.

A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you shall believe the probability of truth favors his testimony in other particulars.

However, descrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a descrepency pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

Once again, you are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your [2488] mind with more convincing force. This does not mean you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of the witnesses, but in the relative convincing force of the evidence.

Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.

You are instructed that in this case the People have attempted to prove as factors in aggravation, prior criminal activity which involved the use or attempted use of or

the express or implied threat to use force or violence. You are instructed that you may not consider any of these incidents in deciding penalty unless such criminal act is proven beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some [2489] possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

In the incident charged as battery and assault, there must exist a union or joint operation of act or conduct and general criminal intent. To constitute general criminal intent it is not necessary there should exist an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful.

The intent with which an act is done is shown as follows:

By a statement of his intent made by a defendant.

By the circumstances attending the act, the manner in which it is done, the means used, and the soundness of mind and discretion of the person committing the act.

For the purpose of the issues on trial here today, you must assume that the defendant was of sound mind at the time of his alleged conduct which, it is charged, constituted the acts described in the information.

There is testimony that the defendant was guilty of an [2490] assault, a violation of Section 240 of the Penal Code. The crime of assault is an unlawful attempt coupled with the present ability, and the general criminal intent, to apply physical force upon the person of another.

In order to prove the commission of the crime of assault, each of the following elements must be proved:

1. That an attempt was made to apply physical force upon the person of another,

2. That such attempt was unlawful, and

3. That at the time of such attempt the person who made the attempt had the present ability to apply such physical force, and

4. That the person making the attempt had general criminal intent, which, in this case, means that he intended to commit an act, that the direct natural and probable consequences of which if successfully completed would be the application of physical force upon the person of another.

To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether assault was committed and, if so, the nature of the assault.

An assault, as defined in the foregoing instructions, may also be committed even though the defendant does not try to apply physical force but merely threatens it [2491] conditionally and immediately.

To constitute such an assault, where the application of force is withheld upon condition, the following circumstances must appear:

1. The condition must be present, not future and the compliance demanded be immediate;

2. The defendant must have no right to impose such a condition;

3. The defendant must have present ability to enforce his condition.

[2492] THE COURT: The definition of battery, pursuant to Penal Code Section 242, is as follows:

Every person who wilfully and unlawfully uses any force or violence upon the person of another is guilty of battery, a misdemeanor.

As used in that foregoing instruction, the words "force" and "violence' are synonymous and mean any wrongful application of physical force against the person of another, even though it causes no pain or bodily harm or leaves no mark and even though only the feelings of such person are injured by the act. The slightest unlawful touching, if done in an insolent, rude or angry manner, is sufficient.

It is not necessary that the touching be done in actual anger or with actual malice; it is sufficient if it was unwarranted and unjustifiable.

The touching essential to a battery may be a touching of the person, of the person's wearing apparel, or of something attached to or closely connected with the person.

No provocative act which does not amount to a threat or attempt to inflict physical injury, and no words, no matter how offensive or exasperating, are sufficient to justify a battery.

The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under special circumstances has been specially [2493] found to be true.

It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances charged have been specially found to be true.

Under the law of this state, you must now determine which of said penalties shall be imposed on the defendant.

You are instructed as jurors you must not be swayed by mere sentiment, conjecture, prejudice, public opinion or public feeling. Also, you must not be influenced by sympathy or passion except as those feelings properly arise out of your consideration of the proven factors in aggravation and mitigation. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, that you will reach a just verdict regardless of what the consequences of such verdict may be.

In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall

consider, take into account and be guided by the following factors, if applicable:

(a), The circumstances of the crime of which the [2494] defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.

(b), The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c), The presence or absence of any prior felony conviction.

(d), Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e), Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(f), The age of the defendant at the time of the crime.

(g), Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

You are instructed that for purposes of your deliberations and verdict you are to consider life without possibility of parole to mean imprisonment until death without release.

After having heard all of the evidence and after [2495] having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree, if you can.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it to this courtroom.

In deciding whether the defendant, Mr. Belmontes, should be sentenced to death or to life imprisonment without the possibility of parole, you must weigh the mitigating circumstances against the aggravating circumstances that you find to be established by the evidence. The fact that you have found Mr. Belmontes guilty beyond a reasonable doubt of the crime of murder in the first degree is not itself an aggravating circumstance.

[2496] I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account

of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the fact on any question submitted to you or that I believe or disbelieve any witness.

If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether [2497] some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

Both the People and the defendant are entitled to the individual opinion of each juror.

It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should

do so only after a discussion of the evidence and instructions with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

The attitude and conduct of jurors at the beginning of their deliberations are matters of considerable importance. It is rarely productive of good for a juror at the outset to make an emphatic expression of his opinion on the case or to state how he intends to vote. When one does that at the beginning, his sense of pride may be aroused and he may hesitate to change his position even if shown that it is wrong. Remember, you are not partisans or advocates in [2498] this matter, but judges.

We will swear the bailiffs in to take charge of the juror.

(Whereupon the bailiffs were sworn to take charge of the jury.)

THE CLERK: Thank you.

THE COURT: We'll give the verdict forms to the bailiff, along with the instructions.

THE BAILIFF: We'll have to leave the jury here while we take Mr. Belmontes out.

THE COURT: Fine.

(Pause)

Ladies and gentlemen, if you will go with the bailiff.

The alternate jurors should probably go with the bailiff as well and stay in the hallway upstairs, if you will.

Thank you.

(Whereupon at 9:56 a.m. the jury retired to commence deliberations and court recessed.)

[2499] (Whereupon court reconvened at 1:35 p.m. and the following proceedings were had:)

THE COURT: Mr. Norton, I understand the jury has a question that was presented to me before the lunch hour, and I asked the bailiff to take you to lunch and on your return I would only read you the instruction that applies to your question. And under the law, that is what I have to do. I could not answer your question without asking you to come back – without asking the panel to come back, and I have to read you the instruction as stated. It is under the concluding instruction, CALJIC 8.84.2 as modified.

The last paragraph. You think it is necessary to read the entire instruction, Mr. Schick? Mr. Wall?

MR. WALL: Well, since Mr. Sueyres wife has had a baby today, I'm here just to fill in.

THE COURT: I'm going to read the entire instruction.

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

You are instructed that for purposes of your deliberations and verdict you are to consider life without possibility of parole to mean imprisonment until death without release.

After having – after having heard all of the evidence and after having heard and considered the arguments of [2500] counsel, you shall consider, take into account and be guided by the applicable factors of aggrevating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggrevating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggrevating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

And the next paragraph is the germane paragraph.

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all 12 jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it into this courtroom.

MR. SCHICK: Excuse me, Judge. I think the one I have on there is what you did read at the time, if you can.

THE COURT: That is an instruction that was provided by defense counsel and I shall read that to you as well.

MR. SCHICK: In 8.84.2 it was just included and I didn't write it down.

THE COURT: It is on mine. I wrote it in on [2501] mine. That is true. Thank you, Mr. Schick.

That sentence was modified by the Court, and in order to make a determination as to the penalty, all 12 jurors must agree, if you can.

JUROR HAILSTONE: If we can't, Judge, what happens?

THE COURT: I can't tell you that.

JUROR WILSON: That is what we wanted to know.

THE COURT: Okay. I know what will happen, but I can't tell you what will happen.

MR. SCHICK: Maybe we should inquire whether the jury could reach a verdict.

THE COURT: Do you think, Mr. Norton, you will be able to make a decision in this matter?

JUROR HAILSTONE: Not the way it is going.

JUROR NORTON: That is tough, yes.

THE COURT: Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?

JUROR NORTON: I believe there is a possibility.

JUROR HUCKABAY: We did need more time.

THE COURT: I think so. I think you need more time.

Yes, Mrs. Hern?

JUROR HERN: The statement about the aggrevation and mitagation of the circumstances, now, that [2502] was the listing?

THE COURT: That was the listing, yes, ma'am.

JUROR HERN: Of those certain factors we were to decide one or the other and then balance the sheet?

THE COURT: That is right. It is a balancing process.

Mr. Meyer?

JUROR MEYER: A specific question, would this be an either/or situation, not a one, if you cannot the other?

THE COURT: No. It is not that.

JUROR MEYER: It is an either/or situation?

THE COURT: Exactly. If you can make that either/or decision. If you cannot, then I will discharge you.

JUROR HAILSTONE: Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?

THE COURT: That is something you cannot consider in making your decision. All right?

We'll ask you return them to the jury room.

THE BAILIFF: I please ask you to wait until –

(Recess at 1:40 p.m.)

[2503] (Whereupon court reconvened at 5:12 p.m. and the following proceedings were had:)

THE COURT: Record should reflect the jury is all present and accounted for.

Defendant is present and all parties are present.

Ladies and gentlemen, it has been a long day for you and I think you best go home and get some rest.

What we will need, gentlemen, is a stipulation from the parties allowing the jury to return to the jury room at 9:00 a.m. tomorrow morning without having to come back to court.

MR. WALL: So stipulated, Your Honor.

MR. SCHICK: So stipulated.

THE COURT: If you will, when you return in the morning, return at nine o'clock at the jury room, the bailiff will await you and you can commence with your deliberations. Have a good evening.

JUROR NORTON: Is it possible we can see the transcript or have the transcript of the trial?

THE COURT: You can have the transcript read to you by the court reporter and you could have any portion of the transcript reread to you at anytime that you wish.

JUROR NORTON: Okay.

THE COURT: And that is why we have the daily transcript in a case of this magnitude.

JUROR NORTON: Thank you.

THE COURT: All right. Have a good evening.

(Whereupon the jury was excused at 5:13 p.m. [2504] and the following proceedings were had outside the presence of the jury:)

MR. SCHICK: Judge, could he have a phone call so he would be able to talk to Mrs. Haro?

THE COURT: Sure.

MR. SCHICK: Thank you.

MR. WALL: Good night, Your Honor.

(Recess at 5:15 p.m.)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. FERNANDO BELMONTES, Defendant.	No. 32183 Dept. No. 7

The above-entitled matter came on regularly for hearing on Friday, August 6, 1982, at the hour of 11:14 a.m., before HON. WILLIAM R. GIFFEN, Judge of the Superior Court of the State of California, for the County of San Joaquin.

REPORTED BY: VICKI MARIE HAUNER, C.S.R. No. 4098 and JOHN SQUIRES, C.S.R. No. 2001

[2505] APPEARANCES OF COUNSEL:

CLARK SUEYRES, Deputy District Attorneys, Courthouse, Stockton, California, appeared as counsel for and on behalf of the People.

JOHN SCHICK, Attorney at Law, 2027 Grand Canal Boulevard, Stockton, California, appeared as counsel for and on behalf of the Defendant.

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[2506] (Whereupon the following proceedings were had:)

THE COURT: People of the State of California versus Fernando Belmontes, Jr. is called. The defendant is present.

We have a note from the jury requesting that certain testimony be reread to them. The jury would like to have read to them Fernando Belmontes' testimony and the pathologist's testimony. Also the testimony of Bob Bolanos. Signed James E. Norton, August 6th, '82. 10:56 a.m..

Yesterday, Mr. Sueyres –

MR. SUEYRES: I read the transcript.

THE COURT: We agreed that the testimony could be read to the jury in the juryroom or in the closed courtroom, which ever would be convenient to them. I have some question as to whether or not they want all of Mr. Belmontes' testimony in the guilt phase as well as the penalty phase. That is the only question that we have. That is number one.

MR. SUEYRES: My inclination would be to say to give it all to them. But I will defer to you on that.

THE COURT: Other question I have, would it be appropriate to allow the jury to read the transcript themselves without –

MR. SUEYRES: Judge, in researching another point, the Court made the comment with respect to the rule about past recollection recorded, that you could put on past recollection recorded by having the recorded statement [2507] read, but not by furnishing a transcript thereof because of the emphasis it gives. But again, I'll defer to the defense in this. If they want the transcript in, that is fine.

THE COURT: Mr. Schick?

MR. SCHICK: I have no real quarrel with the transcript. It may give them a better chance to discuss it. I've been involved in rereadings and you never know what they want. It may give them a chance to go through it at their own pace.

THE COURT: You would stipulate allowing the transcript be placed into custody of the jury?

MR. SCHICK: Yes.

THE COURT: Would you do that also, Mr. Belmontes?

THE DEFENDANT: Yes.

THE COURT: That doesn't present any problems with you?

THE DEFENDANT: No.

THE COURT: Mr. Sueyres?

MR. SUEYRES: Yes, fine.

THE COURT: Well allow the transcript to be provided to the jury for their reading process.

We have the motions and in chambers things.

MR. SQUIRES: We haven't looked to see if there are any in there.

THE COURT: I didn't know.

MR. SCHICK: I thought we would limit it to [2508] the part of these particular witnesses.

THE COURT: That means we will have to splice out pages. It will have to be edited. We have copies of those transcript.

MR. SCHICK: That does present a logistical problem.

MR. SUEYRES: I think there is a couple of conversations at the bench.

MR. SCHICK: Maybe we better revert to plan one and just have it read or want certain parts of it reread. As the reporter goes through it, I suppose they could have it reread to them as long as we limit it to just the testimony of the witnesses they've requested.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Back on the record. We will allow the parties to read through the transcript to determine whether or not there is any confidential information and in-chamber testimony and argument that would be found in the transcript, and those shall be deleted and that, which would be provided the jury, is solely the testimony of Mr. Belmontes, solely the testimony of Doctor Maduros and solely the testimony of Mr. Bolanos. That will be the order of the court.

(Recess at 11:23 a.m.)

MR. SCHICK: Should Mr. Sueyres and I work with the reporters in doing that, Judge?

THE COURT: I think so.

[2509] (Whereupon the jury was brought into the courtroom and the following proceedings were had:)

THE COURT: People of the State of California versus Fernando Belmontes, Jr. is called for further jury trial.

The record should reflect the jury is all present, the alternates are present, the defendant is present and we are ready to proceed.

Mr. Norton, I have your note concerning the reading of the testimony, and I gather that your request with reference to Mr. Belmontes' testimony is his testimony concerning the guilt phase of the trial or did you want –

JUROR NORTON: Yes it is, sir.

THE COURT: All right. What we have agreed to do by way of stipulation and agreement is that we're going to allow you to have the transcripts themselves. Rather than having the court reporter come in and read them, you will be able to have the transcripts as edited with reference to the testimony that you request, because some of the things that will be in that transcript will be things that happened in chambers so we have to take those out. And that is going to take the reporter and counsel a few minutes to do.

So I'm going to let you go to lunch and after lunch you will then be able to go through the transcript.

JUROR NORTON: We have one request. We do not want to go back to Taraminos (sic).

THE COURT: Trebino's?

[2510] JUROR NORTON: Whatever the name of that place.

THE COURT: You mean Heartburn Haven?

JUROR NORTON: I'd rather go to MacDonald's.

THE COURT: Your request is granted.

JUROR NORTON: My stomach also thanks you.

THE COURT: The alternate jurors also will have to be present during the analysis of the transcripts. We will have those available to you immediately after lunch.

JUROR NORTON: Thank you.

(Whereupon counsel approached the bench.)

THE COURT: All right.

Ladies and gentlemen, were going back on the record for a few minutes. It has been pointed out to me by counsel that this is not going to be a rereading of the transcript, and generally in a rereading of a transcript, why the alternate jurors will participate in the rereading. This is going to be somewhat of a unique situation, and so the fact that your rereading of the transcripts on your own is going to be part of your deliberation, and the fact that it is going to be part of your deliberation means that the alternate jurors will not participate in those deliberations. You still participate in lunch. Thank you.

(Whereupon court recessed at 11:31 a.m. and reconvened at 3:34 p.m. and the following proceedings were had:)

THE COURT: The record will reflect the jury is all present and accounted for. The defendant is present.

[2511] Mr. Norton, I understand the jury has reached a verdict?

JUROR NORTON: Yes. Yes, Your Honor.

THE COURT: Will you please hand it to the bailiff.

The clerk will read the verdict.

THE CLERK: Superior Court of California, County of San Joaquin.

The People of the State of California versus Fernando Belmontes, Jr., Defendant, Number 32183, Verdict.

We, the Jury in the above entitled cause, having found the defendant, Fernando Belmontes, Jr., guilty of a violation of Section 187 of the Penal Code of the State of California, to-wit: Murder, a felony, as charged and set forth in Count One of the Amended Information on file herein, and further having fixed the degree thereof to be Murder in the First Degree, and we having further found to be true the special circumstance charged and set forth in the Amended Information on file herein, to-wit: That the murder was committed while the defendant was engaged in the commission and attempted commission of burglary, a felony, in violation of Section 460 of the Penal Code, we do now fix the penalty at death. Dated August 6th, 1982, James E. Norton, foreman.

THE COURT: Did you wish the jury to be polled?

MR. SCHICK: Yes.

THE COURT: Ladies and gentlemen, we will [2512] poll the jury. As your name is called and you are asked whether or not the verdict called is yours, state yes or no.

THE CLERK: Ann Christansen, is the verdict as stated your verdict?

JUROR CHRISTANSEN: Yes.

THE CLERK: Diane Hern, is the verdict as stated your verdict?

JUROR HERN: Yes.

THE CLERK: Lloyd Huckabay, is the verdict as stated your verdict?

JUROR HUCKABAY: Yes.

THE CLERK: James Norton, is the verdict as stated your verdict?

JUROR NORTON: Yes.

THE CLERK: Betty Martin, is the verdict as stated your verdict?

JUROR MARTIN: Yes.

THE CLERK: Michael Thompson, is the verdict as stated your verdict?

JUROR THOMPSON: Yes.

THE CLERK: Katryna Hailstone, is the verdict as stated your verdict?

JUROR HAILSTONE: Yes.

THE CLERK: Mary Schenone, is the verdict as stated your verdict?

JUROR SCHENONE: Yes.

THE CLERK: Grace Wilson, is the verdict as stated your verdict?

[2513] JUROR WILSON: Yes.

THE CLERK: Thomas Giles, is the verdict as stated your verdict?

JUROR GILES: Yes.

THE CLERK: Elaine Schilling, is the verdict as stated your verdict?

JUROR SCHILLING: Yes.

THE CLERK: Ronald Meyer, is the verdict as stated your verdict?

JUROR MEYER: Yes.

THE COURT: The record and minutes will reflect the jury has been properly polled and in the presence of the defendant.

Ladies and gentlemen, it was not an easy case. I wish to commend you for what you've done and it was not easy, as I say. I thank you. You will be discharged.

If you wish to talk to counsel now you may certainly do so. I'm sure Mr. Schick and Mr. Sueyres will have some questions they may want you to answer. You can talk to them now if you so desire. You don't have to. If they call you at home, which they are allowed to do, you can talk to them as well. Thank you. You are discharged.

(Whereupon the following proceedings were at out of the presence of the jury at 3:37 p.m.:)

THE COURT: We will receive a stipulation from counsel to allow the clerk to enter the verdict of the jury out of the presence of the jury?

MR. SCHICK: Yes.

[2514] THE COURT: Mr. Sueyres?

MR. SUEYRES: Yes, Your Honor.

Your Honor, there is one matter that I had spoken to Mr. Schick and would request to place on calendar. It regards juror number 38, Mr. Meyer or Juror Number 12, Mr. Meyer. During the course of the guilt phase I observed a lady in the courtroom to be talking to Mr. Meyer, and later I had occasion to speak to her myself during the recess. It developed that it was Mr. Schick's secretary. And just to satisfy myself, I had asked her if she had discussed anything about the trial and she said she had not. And I believe that to be the case. But because some question has been raised concerning Mr. Meyer at an earlier time, I thought it appropriate that that occurred as well should be placed on the record.

THE COURT: Did you know anything about that matter, Mr. Schick?

MR. SCHICK: I told Mr. Sueyres this morning. Her father is a minister in Lodi and Mr. Meyer belongs to that church, so he knew her and they were chatting.

THE COURT: All right. We will have to set the matter for hearing with reference to modification.

MR. SCHICK: Yes.

THE COURT: What is your pleasure, Mr. Schick.

I would assume that the motion for modification should be made at the same time you have your other motions that you will want to make?

[2515] MR. SCHICK: Yes, Judge. I believe the motion under 1181.7 is automatic.

I would request a few weeks, because I would like to put together some points and authorities in regard to that and some other things.

THE COURT: All right.

MR. SCHICK: Today is the 6th. Could I suggest the 3rd of September?

THE COURT: The 3rd of September.

MR. SCHICK: That is four weeks away. That should give me enough time. I will be gone for a few weeks in there.

THE COURT: Time waived?

MR. SCHICK: Time is waived.

What time do you want that, Judge.

THE COURT: Ten o'clock.

We have the transcripts requested by the jury to be read, and what I would like to do is have them marked and made part of the record to be sent to the Supreme Court as part of the record so they will know what the jury did read, and that would be the statements and testimony of Robert Gilbert Bolanos, we'll make that People's Number 32 – what is the next one?

MR. SUEYRES: Perhaps you should mark it as the Court's exhibit, Your Honor.

THE COURT: It will be my exhibit, Court's Exhibit 1.

The testimony of Fernando Belmontes, Jr., will be [2516] Court's Exhibit 2.

The testimony of Bill P. Maduros, M.D., will be Court's Exhibit 3. They shall become part of the record.

(Whereupon transcripts were marked as Court's Exhibit Numbers 1, 2 and 3 and received in evidence.)

MR. SUEYRES: Your Honor, while we spoke of doing it, I think it is appropriate to put on the record the fact that Mr. Schick and I met with the Court Reporters during the lunch hour and went over very carefully the parts of the transcript that had to be deleted because there were objections and inappropriate comments, and –

MR. SCHICK: That is correct.

THE COURT: You joined in that?

MR. SCHICK: We agreed to that proceeding and all deletions were agreed to buy both myself and Mr. Sueyres and were made part of the transcript.

THE COURT: And you participated with the court reporters in analyzing those statements?

MR. SCHICK: Yes.

MR. SUEYRES: Yes, Your Honor.

THE COURT: Okay. After the motion for modification is made, then Mr. Belmontes will be referred to the Probation Department. September 10th?

MR. SCHICK: 3rd. Friday, September 3rd.

THE COURT: Ten a.m..

MR. SCHICK: May Mr. Belmontes have a few phone calls?

[2517] THE COURT: Certainly.

(Recess at 3:43 p.m.)

No. 01-99018

IN THE NINTH CIRCUIT COURT OF APPEALS

FERNANDO BELMONTES, Petitioner and Appellant, vs. JEANNE WOODFORD, WARDEN, Respondent and Appellee.	) DC No.) CV-89-073 DFL (JFM)

APPELLANT'S OPENING BRIEF

(Death Penalty Case)

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TOPICAL INDEX

	Page
APPELLANT'S OPENING BRIEF	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES PRESENTED	2
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	6

A. Guilt Phase 6
1. The prosecution's evidence 6
2. The defense case 12
B. Penalty Phase 15
1. The prosecution's evidence in aggravation. 15
2. The defense evidence in mitigation 15
ARGUMENT 19
I. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE REGARDING APPELLANT'S BACKGROUND, CHARACTER, MENTAL STATE, AND POSITIVE PRISON ADJUSTMENT 23
A. Counsel's Undisputed Failure to Conduct An Adequate Investigation 23
B. The Overwhelming Demonstration of Prejudice 28
1. The deficiencies in the District Court's discussion of prejudice 28
2. The wealth of mitigating evidence that could have been presented 38
a. Alcoholism and domestic violence against appellant's mother 38
b. Demeaning and discriminatory treatment of Fernando, Sr. by the Salvaggio family 38
c. Circumstances of objective and comparative poverty during appellant's early childhood 39

d. Appellant's positive achievements during his youth in Little League, the Cadets, and his employment in the face of obstacles..... 40

e. Onset of rheumatic fever at approximately age 10 and curtailment of activities..... 44

f. Subjective adversity, fears of premature death..... 46

g. Depression as a consequence of the rheumatic fever and enforced isolation..... 46

h. The breakup of his home following mother's second divorce in 1977..... 47

i. Appellant's involvement in teenage criminality and youth gang support... 48

j. Anti-Hispanic racial attitudes at high school..... 49

k. Positive prior institutional adjustment and positive future prospects.... 49

3. The weakness of the evidence that was presented..... 51

4. The unprepossessing case in aggravation..... 56

5. The closeness of the case as demonstrated by the course of jury deliberations..... 59

6. The failure to grant an evidentiary hearing..... 60

II. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S FAILURE TO DISCLOSE MATERIAL BENEFITS CONFERRED ON THE START ACCOMPLICE WITNESS, BOBBY BOLANOS, AND BY THE FAILURE TO CORRECT FALSE AND MISLEADING TESTIMONY THAT NO SUCH BENEFITS EXISTED 62

A. The Undisputed Failure to Disclose Material Impeachment Evidence and the Failure to Correct False Testimony 62

B. The District Court's Erroneous Assessment of Prejudice 64

1. The District Court's failure to recognize and consider the dismissals as a source of continuing bias in favor of the prosecution 65

2. The District Court's failure to recognize and consider the prejudicial effect of the prosecution's failure to correct false testimony during trial 67

3. The District Court's erroneous assessment of other incriminating evidence ... 68

III. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S USE OF INCULPATORY STATEMENTS WHICH WERE INVOLUNTARILY EXTRACTED BY POLICE OFFICERS WHO THREATENED APPELLANT WITH THE DEATH PENALTY AND THEN OFFERED A HOPE OF LENIENCY THROUGH CONFESSION 71

IV. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO CHALLENGE THE LAWFULNESS OF APPELLANT'S ARREST AND THE VALIDITY OF THE ATTENDANT SEIZURE OF PROPERTY 73

V. APPELLANT WAS DEPRIVED OF DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE CONFLICT OF INTEREST RESULTING FROM THE MULTIPLE PRIOR REPRESENTATIONS OF CODEFENDANT VASQUEZ BY DEFENSE COUNSEL, HIS CURRENT PARTNERS, AND A FORMER ASSOCIATE, AND BY THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE INQUIRY AND ADVISEMENT OF THE NOTICE AND CONSEQUENCES OF THE CONFLICT 75

A. The District Court's Error Regarding the Severity of the Conflict of Interest 77

B. The District Court's Error Regarding the Trial Court's inquiry 83

VI. APPELLANT WAS DEPRIVED OF DUE PROCESS WHEN THE PROSECUTOR CROSS-EXAMINED HIM AS TO HIS POST-CHARGING SILENCE REGARDING THE SUBSTANCE OF HIS EVENTUAL TESTIMONY 88

VII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND HIS RIGHT OF CONFRONTATION BY THE TRIAL COURT'S REFUSAL TO PERMIT CROSS-EXAMINATION OF CARRIE VASQUEZ REGARDING HER BIAS AND MOTIVE TO FABRICATE TESTIMONY AGAINST APPELLANT 88

VIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE REPEATED AND CUMULATIVE EVIDENTIARY AND INSTRUCTIONAL ERRORS, WHICH IMPROPERLY BOLSTERED THE TESTIMONY OF PROSECUTION WITNESS BOBBY BOLANOS 90

IX. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY BY THE COUNTY'S USE OF JURY VENIRE SELECTION PROCEDURES WHICH SYSTEMATICALLY EXCLUDED MINORITY JURORS 90

X. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY NUMEROUS INSTANCES OF JURY MISCONDUCT .. 91

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE COURT'S ERRONEOUS INSTRUCTIONS TO THE JURY REGARDING THEIR SENTENCING RESPONSIBILITIES 93

XII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE ERRONEOUS ADMISSION OF EVIDENCE OF PRIOR MISCONDUCT 95

XIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE ARBITRARY AND DISCRIMINATORY MANNER IN WHICH THE DEATH PENALTY WAS CHARGED AND IMPOSED IN HIS CASE 95

XIV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE TRIAL COURT'S REFUSAL TO ADEQUATELY RESPOND TO THE JURY'S QUESTION ABOUT THE CONSEQUENCES OF THEIR FAILURE TO AGREE ON A PENALTY 99

XV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIBUNAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE TRIAL COURT'S PREJUDGMENT OF THE MOTION TO REDUCE APPELLANT'S DEATH SENTENCE 100

CONCLUSION 101

STATEMENT OF RELATED CASES 102

CERTIFICATE OF COMPLIANCE 102

* * *

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE COURT'S ERRONEOUS INSTRUCTIONS TO THE JURY REGARDING THEIR SENTENCING RESPONSIBILITIES.

The trial court committed constitutional error in this case that is functionally indistinguishable from that which required granting habeas corpus relief in *Penry* v. *Johnson*

532 U.S. 782, S.Ct. 1910 (2001). *Penry* issued habeas corpus relief because the penalty phase instructions circumscribed the jury's consideration of mental state mitigating evidence regarding retardation. Here, the jury specifically asked for judicial guidance during penalty deliberations regarding the scope of mitigation, the nature of the decision process, and the consequences of a hung jury: The trial court's instructions circumscribed the jury's consideration of non-statutory mitigation evidence regarding appellant's background and his positive conduct while in the M-2 program in youth authority.

Reversal is required because, just as *Penry* found, "The jury received mixed signals" as to the import of the mitigating evidence, and these mixed signals were sufficient to establish a reasonable possibility that one or more jurors misapplied the correct constitutional standard under *Boyde* v. *California* 494 US 370, 380 (1990). *Penry*, supra, 121 S.Ct. at 1923.

The District Court erroneously concluded that in light of the overall instructions and argument, no prejudice was shown. However, the offending instruction here were given during the crucible of jury deliberations, and would have been paramount in the jurors' minds when they actually returned the death verdict. Just as the Supreme Court in *Penry* was "skeptical that, by the time their penalty deliberations began, the jurors would have remembered the explanations given during voir dire," 121 S.Ct. at 1923, this Court should be equally skeptical that the jurors relied on previously given instructions to guide their deliberations, rather than on the responses to the very specific questions posed during deliberations.

* * *

01-99018

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, Petitioner-Appellant, **v.** **JOANNE WOODFORD, Warden,** Respondents-Appellees.	**CAPITAL CASE**

On Appeal from the United States District Court
for the Eastern District of California
No. CV S-89-0736 DFL JFM
The Honorable David F. Levy, Judge

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TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
STANDARD OF REVIEW	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE FAILURE TO PRESENT MITIGATING EVIDENCE DURING THE PENALTY PHASE TRIAL	5
A. Appellant's Ineffective Assistance Claims Were Properly Denied Because They Were Not Procedurally Cognizable In Federal Habeas	6
B. Defense Counsel Competently Prepared For And Conducted The Penalty-Phase Trial	9
C. Appellant Was Not Prejudiced By Trial Counsel's Alleged Ineffectiveness	33
II. THE DISTRICT COURT WAS WITHIN ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING REGARDING HIS CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILURE TO INVESTIGATE OR PRESENT THE PROFFERED MITIGATING EVIDENCE IN THE PENALTY-PHASE TRIAL	45

III. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION BASED ON THE PROSECUTION'S ALLEGED FAILURE TO DISCLOSE MATERIAL BENEFITS TO A WITNESS 49

A. Factual Background 49

B. Appellant's Claim Of "Material Benefits" Does Not Disclose Constitutional Error Warranting Habeas Relief 51

IV. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM THAT HIS INCULPATORY PRETRIAL STATEMENTS WERE INVOLUNTARY BECAUSE OF POLICE COERCION 58

V. THE DISTRICT COURT PROPERLY REJECTED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE BASED ON TRIAL COUNSEL'S FAILURE TO CHALLENGE THE ARREST WARRANT IN THIS CASE 60

VI. THE DISTRICT COURT PROPERLY REJECTED APPELLANT'S CLAIM THAT TRIAL COUNSEL LABORED UNDER A CONFLICT OF INTEREST 64

VII. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF *DOYLE* ERROR 78

VIII. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION STEMMING FROM THE LIMITATION OF HIS ABILITY TO CROSS-EXAMINE KARRIE ROGERS 81

IX. THE DISTRICT COURT PROPERLY REJECTED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION RELATING TO EVIDENCE INTRODUCED TO CORROBORATE BOBBY BOLANOS'S TESTIMONY... 85

X. THE DISTRICT COURT PROPERLY REJECTED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION STEMMING FROM THE JURY VENIRE SELECTION PROCEDURES IN SAN JOAQUIN COUNTY..... 87

XI. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING AN EVIDENTIARY HEARING ON APPELLANT'S CLAIM OF JUROR MISCONDUCT..... 90

XII. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION AND CRUEL AND UNUSUAL PUNISHMENT BASED ON ALLEGEDLY ERRONEOUS INSTRUCTIONS REGARDING THE JURY'S SENTENCING RESPONSIBILITIES..... 94

XIII. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION AND CRUEL AND UNUSUAL PUNISHMENT BASED ON THE INTRODUCTION OF PENALTY-PHASE EVIDENCE OF UNADJUDICATED PRIOR INSTANCES OF MISCONDUCT..... 99

XIV. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION, AN EQUAL PROTECTION VIOLATION, AND CRUEL AND UNUSUAL PUNISHMENT BASED ON THE CLAIM THAT APPELLANT'S DEATH JUDGMENT RESULTED FROM AN ARBITRARY AND DISCRIMINATORY CHARGING DECISION 101

XV. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION AND CRUEL AND UNUSUAL PUNISHMENT BASED ON THE TRIAL COURT'S ANSWER TO A JURY QUESTION ABOUT THE CONSEQUENCES OF A FAILURE TO REACH A VERDICT 107

XVI. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION AND CRUEL AND UNUSUAL PUNISHMENT BASED ON A LETTER THE TRIAL COURT SENT TO THE JURORS FOLLOWING THE PENALTY-PHASE TRIAL 110

CONCLUSION 113

STATEMENT OF RELATED CASES 114

* * *

XII.

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION AND CRUEL AND UNUSUAL PUNISHMENT BASED ON ALLEGEDLY ERRONEOUS INSTRUCTIONS REGARDING THE JURY'S SENTENCING RESPONSIBILITIES

Appellant next claims the trial court gave the jury erroneous instructions which somehow "circumscribed the jury's consideration on non-statutory mitigation evidence." (AOB 94.) Although it is unclear, the claim *appears* to relate to Appellant's "claim B-3" previously raised in the district court. That claim pertains to a brief exchange between the trial court and one of the jurors in a meeting during jury deliberations following the penalty phase trial:

> Juror Hern: The statement about the aggravation and mitagation [sic] of the circumstances, now, that was the listing?
>
> The Court: That was the listing, yes, ma'am.
>
> Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?
>
> The Court: That is right. It is a balancing process.

(RT 2502-2502.).

Appellant now apparently claims, for the first time, that the exchange between the court and Juror Hern mandates reversal of the judgment under *Penry v. Johnson,* 532 U.S. 782 (2001). In this regard, Appellant characterizes the trial court's brief response to Juror Hern's

question as being an improper jury instruction which allowed the jury to disregard the "non-statutory mitigating evidence" presented in the penalty-phase trial. (AOB 93-95.)

Appellant's newfound reliance on *Penry* is misplaced. In *Penry*, the decision of whether a death sentence was appropriate rested entirely on the jury's factual determination of three statutorily mandated "special issues." The jury was also given a "supplemental instruction" which said to consider mitigating circumstances when deliberating on the "special issues." *Id.* at 782-783.

The High Court found the "supplemental instruction" was constitutionally insufficient because, although the jury was told to consider mitigating circumstances, "the jury's ability to consider and give effect to Penry's mitigating evidence was still 'shackled and confined within the scope of the three special issues.' [Citation]." *Id.* at 798. Because the use of mitigating evidence was limited solely to its use in proving or disproving the three "special issues," the jury was given "no vehicle" for expressing a view that Penry might not deserve a death sentence based on his mitigating evidence of mental retardation and child abuse, which had no relevance to any of the "special issues." *Id.* at 976-804.

The present issue bares no resemblance to *Penry*. Unlike in *Penry*, the jury here was told nothing to suggest their evaluation of any mitigating evidence, or the weight to be attributed thereto, was in any way limited. To the contrary, the jury here was expressly instructed that "the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors you may take into account as reasons for deciding not to impose a death sentence upon Mr. Belmontes . . . Any

one of them, standing alone, may support a decision that death is not the appropriate punishment in this case." (CT 1084; RT 2496.)

Moreover, the present issue does not involve a faulty instruction but, rather, concerns the trial court's rather informal response to one of the juror's questions. Assuming, arguendo, these informal remarks by the judge might somehow be construed as potentially misleading "jury instructions," Appellant is still unable to provide any basis for relief.

A claim an instruction was subject to an erroneous interpretation does not establish a due process violation unless there is a "reasonable likelihood that the jury has applied" the instruction in a way that violates the Constitution. *Estelle v. McGuire,* 502 U.S. 62, 72 (1991); *Boyde v. California,* 494 U.S. 379, 380 (1990).

There is no such chance here. Juror Hern's inquiry did not convey a misunderstanding about the factors to be considered in the penalty phase deliberations. Her use of the word "listing" did not reflect a view that extenuating or mitigating circumstances were restricted to those specifically listed. Nor did her use of the metaphor, "balance the sheet," convey an unconstitutionally restrictive understanding of the jury's role in penalty-phase determinations. Moreover, as noted, the court never said anything to indicate the jurors were limited or in any way restricted from using any mitigating evidence in any way they saw fit in determining whether Appellant deserved a death sentence. Indeed, the court's answer to Juror Hern's question properly characterized the balancing process of penalty-phase determinations under California law. *See People v. Bacigalupo*, 6 Cal.4th 457, 470 (1993).

Furthermore, "a single instruction to a jury may not be judged in artificial isolation," but must be viewed in the context of the instructions as a whole and the entire record. The question is whether the ailing instruction by itself so infected the entire trial that the resulting judgment violates due process. *Estelle,* at 72; *Cupp v. Naughten,* 414 U.S. 141, 147 (1973). A theoretical or abstract claim does not establish constitutional error. *Cupp,* at 148-149.

As noted, the jurors here were expressly instructed they were not limited to any preordained mitigating circumstances and that their finding of any single mitigating circumstance could be sufficient to support a decision that death was not the appropriate punishment in this case. (CT 1084; RT 2496.) Moreover, the closing arguments on both sides made it clear the jury was to consider and weigh all of Appellant's mitigating evidence. (RT 2452-2462, 2472-2479.)

In sum, the jury very clearly understood they could consider any evidence in mitigation and give any such evidence whatever weight they felt it deserved. There is virtually no chance the jury applied the judge's remarks to Juror Hern in a way that violated the Constitution, and there is no chance the judge's remarks were enough by themselves to "infect the entire trial" sufficient to violate due process. Again, the district court properly rejected this claim.

* * *

No. 01-99018

IN THE NINTH CIRCUIT COURT OF APPEALS

FERNANDO BELMONTES, Petitioner and Appellant, vs. JEANNE WOODFORD, WARDEN, Respondent and Appellee.	DC No. CV-89-073DFL(JFM)

APPELLANT'S RELY BRIEF

(Death Penalty Case)

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TOPICAL INDEX

Page

APPELLANT'S REPLY BRIEF 1

I. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE REGARDING APPELLANT'S BACKGROUND, CHARACTER, MENTAL STATE, AND POSITIVE PRISON ADJUSTMENT. 1

A. *Appellee's Argument Regarding Lack of Exhaustion is Frivolous.* 1

B. *Defense Counsel's Failure to Conduct Any Inquiry into Penalty Phase Mental State Mitigation Evidence Was Unreasonable.* 6

C. *Counsel's Failure to Investigate Was Extremely Prejudicial* 12

1. Appellee's misguided efforts to distinguish the law of penalty phase prejudice 12

2. Appellee's failure to acknowledge the evidence in the record of appellant's brain damage as a mitigating factor.

3. Appellee's misunderstanding of the value of expert mental state testimony in mitigation. 16

4. The rebuttal phantom. 21

5. The unprepossessing aggravation in this case. 23

6. The overall deficiency in the penalty presentation 25

7. The jury deliberations confirm that additional mitigation would have likely resulted in a life verdict. 27

D. The District court's error in denying an evidentiary hearing 27

II. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S FAILURE TO DISCLOSE MATERIAL BENEFITS CONFERRED ON THE START ACCOMPLICE WITNESS, BOBBY BOLANOS, AND BY THE FAILURE TO CORRECT FALSE AND MISLEADING TESTIMONY THAT NO SUCH BENEFITS EXISTED. 30

III. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S USE OF INCULPATORY STATEMENTS WHICH WERE INVOLUNTARILY EXTRACTED BY POLICE OFFICERS WHO THREATENED APPELLANT WITH THE DEATH PENALTY AND THEN OFFERED A HOPE OF LENIENCY THROUGH CONFESSION. 35

IV. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO CHALLENGE THE LAWFULNESS OF APPELLANT'S ARREST AND THE VALIDITY OF THE ATTENDANT SEIZURE OF PROPERTY. 37

V. APPELLANT WAS DEPRIVED OF DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE CONFLICT OF INTEREST RESULTING FROM THE MULTIPLE PRIOR REPRESENTATIONS OF CODEFENDANT VASQUEZ BY DEFENSE COUNSEL, HIS CURRENT PARTNERS, AND A FORMER ASSOCIATE, AND BY THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE INQUIRY AND ADVISEMENT OF THE NOTICE AND CONSEQUENCES OF THE CONFLICT. 38

VI. APPELLANT WAS DEPRIVED OF DUE PROCESS WHEN THE PROSECUTOR CROSS-EXAMINED HIM AS TO HIS POST-CHARGING SILENCE REGARDING THE SUBSTANCE OF HIS EVENTUAL TESTIMONY..... 41

VII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND HIS RIGHT OF CONFRONTATION BY THE TRIAL COURT'S REFUSAL TO PERMIT CROSS-EXAMINATION OF CARRIE VASQUEZ REGARDING HER BIAS AND MOTIVE TO FABRICATE TESTIMONY AGAINST APPELLANT..... 42

VIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE REPEATED AND CUMULATIVE EVIDENTIARY AND INSTRUCTIONAL ERRORS, WHICH IMPROPERLY BOLSTERED THE TESTIMONY OF PROSECUTION WITNESS BOBBY BOLANOS..... 43

IX. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY BY THE COUNTY'S USE OF JURY VENIRE SELECTION PROCEDURES WHICH SYSTEMATICALLY EXCLUDED MINORITY JURORS..... 43

X. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY NUMEROUS INSTANCES OF JURY MISCONDUCT.. 43

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE COURT'S ERRONEOUS INSTRUCTIONS TO THE JURY REGARDING THEIR SENTENCING RESPONSIBILITIES. 44

XII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE ERRONEOUS ADMISSION OF EVIDENCE OF PRIOR MISCONDUCT..... 51

XIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE ARBITRARY AND DISCRIMINATORY MANNER IN WHICH THE DEATH PENALTY WAS CHARGED AND IMPOSED IN HIS CASE. 51

XIV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE TRIAL COURT'S REFUSAL TO ADEQUATELY RESPOND TO THE JURY'S QUESTION ABOUT TILE CONSEQUENCES OF THEIR FAILURE TO AGREE ON A PENALTY. 53

XV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIBUNAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE TRIAL COURT'S PRE-JUDGMENT OF THE MOTION TO REDUCE APPELLANT'S DEATH SENTENCE. 53

CONCLUSION 55
CERTIFICATE OF COMPLIANCE 56
CERTIFICATE OF RELATED CASES 56

* * *

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE COURT'S ERRONEOUS INSTRUCTIONS TO THE JURY REGARDING THEIR SENTENCING RESPONSIBILITIES.

Appellee acts as if there is some question as to the provenance of this claim, remarking that "[a]lthough it is unclear, the claim *appears* to relate to appellant's 'claim B-3' previously raised in the district court," AG 94. *Of course,* this claim is the same claim of jury instruction error identified as B-3 in the proceedings below. The culmination of the instructional error occurred during the colloquy between juror Hern and the trial court during penalty deliberations:

> "Juror Hern: the statement about the aggravation and mitagation [sic] of the circumstances, now, that was the listing?
>
> The Court: That was the listing, yes, ma'am.
>
> Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?
>
> The Court: That is right. It is a balancing process." RT 2501-2.

Appellant has been arguing that since the direct appeal in 1982, this mid-deliberation instruction constituted an Eighth Amendment violation under controlling authority of the United States Supreme Court, including *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987). The crux of appellant's claim is that the jury must necessarily have been laboring under a misapprehension that they were restricted to a consideration of statutorily enumerated mitigating factors, and that their responsibility with respect to this circumscribed list of factors was simply to "balance the sheet" in some mechanical, arithmetic fashion. Otherwise, juror Hern would never have interrupted the deliberations to ask the series of questions that she did. Both the District court and appellee argue that *preceding* instructions correctly encapsulated law for the jury, but those instructions were legally suspect and factually ineffective; otherwise the mid-deliberation questions would never have arisen. Nothing occurred *after* the mid-deliberation colloquy to get the jurors back onto the constitutionally correct track.

Appellee appears to chide counsel for appellant for citing *Penry* v. *Johnson*, 532 U.S. 782 (2001) in his opening brief, pejoratively referring to "[a]ppellant's newfound reliance on *Penry*," AG 95, as if this reference to *Penry* somehow constituted an alteration of the argument. To the contrary, *Penry* drives home the nail that appellant has been pounding on for more than 15 years, i.e., that the jury was unconstitutionally misdirected and restricted to consideration of statutory factors in the penalty deliberations. When juror Hern asked, "The statement about the aggravation and mitigation of the circumstances, now, that was the listing?"; the trial court erroneously answered, "Yes, that was the listing." However, the constitutionally

correct answer was "no," followed by, at a minimum, a reiteration of the previously given instruction that "the mitigating circumstances I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as the reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." However, the trial court confirmed juror Hern's misunderstanding that there was a finite of list of mitigating factors, rather than disabuse her and the other jurors of that incorrect understanding.

The incorrect understanding was reiterated when juror Hern immediately asked, "Of those certain factors, we were to decide one or the other and then balance the sheet?" Juror Hern clearly understood that there was a *certain,* i.e., finite, list of factors, which were to be determined as either weighing in aggravation or weighing in mitigation, and then the jury would "balance the sheet." The court confirmed that improper understanding, and unconstitutionally constrained juror Hern and all the other jurors present during the colloquy to a consideration of the statutorily enumerated factors, with the idea of non-statutory mitigation being excised from meaningful consideration.

The trial court should have told the jury that there was no "certain" list of factors, but rather that any and all evidence presented by appellant could be considered in mitigation, and any particular piece of that evidence could be sufficient to support a vote for a life verdict. The trial court failed to do so, and the jury concluded its penalty deliberations under an unconstitutional misapprehension.

Appellee simply cannot be correct that the earlier and ineffectual instructions could have cured the error

occurred [sic] during the mid-deliberation colloquy. At best, the preceding instructions provided the jury with mixed signals, which the jury did not understand and process, after which they got a final set of clearly erroneous signals during the Hern colloquy. *Penry* is clear that "mixed signals" as to the import of mitigating evidence require habeas corpus relief.

Shafer v. *South Carolina,* 532 U.S. 36, 53 (2002) clearly recognized that a question from a capital jury during deliberation regarding the parameters of their deliberations leaves "no doubt about [the jury's] failure to gain from . . . the judge's instructions any clear understanding of what a life sentence means." It does not require a pronouncement of the United States Supreme Court to establish the commonsense principle that if jurors ask questions about what they are supposed to do, the inference is compelled that the instructions previously given to them did not supply the answers. More recently, *Kelly* v. *South Carolina,* 534 U.S. 246 (2002) reconfirmed this commonsense view with the observation that "the jurors' questions in *Simmons* and *Shafer* confirms the inadequacy of the charges in those cases . . . "

Appellee appears to demonstrate unfamiliarity with the Supreme Court's cases regarding jury instructions and jury questions by suggesting that "The present issue does not involve a faulty instruction but, rather, concerns the trial court's rather informal response to one of the jurors' questions," as if mid-deliberation jury questions and judicial answers were mere flotsam on the stormy seas of litigation. To the contrary, commonsense and case law from *Bollenbach* v. *Unitd States,* 326 U.S. 607 (1946) through *Simmons* through *Shafer* confirmed that a trial court's response to mid-deliberation jury questions is

crucial in assuring that the jurors have a correct understanding of the law when they ultimately arrive at a decision.

The flagrant misinstruction during the mid-deliberation colloquy in fact compounded the problem generated from the earlier restrictive instruction that recently required relief in *Payton* v. *Woodford,* U.S. App. Lexus 15416 (2002). Both *Payton's* jury and appellant's jury were instructed in the then standard language of CALJIG 8.84.1 (4th Edition, 1979), which lists the statutorily enumerated factors including Factor K, describing the final factor as any circumstances "which extenuates the gravity of the crime even though it is no [sic] a legal excuse for the crime." This Court reversed Payton's death sentence because the instruction likely constrained the jury's consideration of Payton's post-offense conversion to Christianity and good work while in jail. The combination of the constricted Factor (k) instruction and its restrictive reiteration during the *Hern* colloquy renders it likely that the jury disregarded appellant's mitigating evidence regarding his religious efforts while in CYA and his prospects for good institutional adjustment if given a life sentence.

The bottom line is that the trial court's failure to ensure that the jury had a proper understanding of its sentencing responsibilities when juror Hern posed the crucial questions during deliberations violated the Eighth Amendment. *Payton* recognized that "[t]he year after the jury pronounced Payton's death sentence [1982], the California Supreme Court recognized the potential for jury confusion inherent in the wording of factor (k) citing *People* v. *Easley,* 34 Cal.3d 858 (1983) [where's ending quote?]. The instruction was amended to include a direction that the

jury may consider "any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." CALJIG 8.85(k) (6th Edition, 1996).

The District court clearly erred in its conclusion that the jury was not misled by the trial court's responses to the Hern colloquy, particularly where the seeds of confusion were clearly sown in the earlier unadorned factor (k) instruction that by itself required relief in *Payton*. *Payton* emphasizes that "Standing alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence." Appellant's mitigating evidence regarding his prospects for good institutional adjustment was unfairly diminished by the unconstitutional instruction because future conduct in prison, however exemplary, "cannot possibly 'extenuate the gravity of the crime'," *Payton*, Lexis p. 21.

While appellee argues that "The prison issue bares [sic] no resemblance to *Penry*," AG 95, this Court held that *Penry* expressly confirmed its conclusion that "There was a reasonable likelihood that the jury did not consider Payton's mitigation evidence." Ibid. The crux of the *Penry* ruling is that the trial court must provide the jury with an instructional "vehicle" to give full consideration to all of a defendant's mitigating evidence. The trial court's responses to the Hern questions deprived the jury of that necessary vehicle.

Regarding the final determination of harmless error, *Payton* concluded that "[p]lacing the 'risk of doubt' on the state is also consistent with the body of jurisprudence that has placed the burden of showing lack of prejudice on the party who would benefit from the constitutional error."

Even though *Peyton* was convicted of a brutal rape murder and the attempted murder of a mother and her child in the same transaction, this Court found that the circumstances of the offense, while undeniably "brutal," in no way overcame the inhibitions on the consideration of mitigating evidence. The District court in this case recognized that "The aggravating evidence actually presented to the jury did not make this a clear-case for application of the death penalty," ER 8, p. 49. Moreover, appellant's argument XIII, infra, regarding the arbitrary and discriminatory imposition of the death sentence in San Joaquin County, demonstrates that the circumstances of appellant's crime fall within the lowest echelon of heinousness among capital-eligible murders. Under these circumstances, the erroneous restrictions on the jury in considering appellant's mitigating evidence must be deemed prejudicial under *Payton* and *O'Neal* v. *McAnnich*, 513 U.S. 432, 435 (1995).

* * *

01-99018

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, Petitioner-Appellant, **v.** **JEANNE WOODFORD, Warden,** Respondents-Appellees.	**CAPITAL CASE**

On Appeal from the United States District Court
for the Eastern District of California
No. CV S-89-0736 DFL JFM
The Honorable David F. Levy, Judge

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. THE MAJORITY OPINION CONFLICTS WITH THE SUPREME COURT'S HOLDING IN *BOYDE*	3
II. THE MAJORITY OPINION MISAPPLIES THE CONTROLLING STANDARD FOR ASSESSING CONSTITUTIONAL ERROR ENUNCIATED IN *BOYDE*	10
III. THE MAJORITY OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE V. LANE*, 489 U.S. 288	16
CONCLUSION	19

TABLE OF AUTHORITIES

Cases **Page**

Belmontes v. Calderon, 488 U.S. 1034 (1989) 17

Boyde v. California, 494 U.S. 370 (1990) .....1, 3-5, *passim*

Butler v. McKellar, 494 U.S. 407 (1990) 16

California v. Brown, 479 U.S. 538 (1987) 9

Caspari v. Bohlen, 510 U.S. 383 (1994) 16, 17

Cupp v. Naughten, 414 U.S. 141 (1973) 13

Graham v. Collins, 506 U.S. 461 (1993) 16

Penry v. Lynaugh, 492 U.S. 302 (1989) 16

People v. Bacigalupo, 6 Cal.4th 457 (1993) 13

People v. Crittenden, 9 Cal.4th 83 (1994) 13

Skipper v. South Carolina, 476 U.S. 1 (1986) 6, 8, 11, 14, 17

Stringer v. Black, 503 U.S. 222 (1992) 16

Teague v. Lane, 489 U.S. 288 (1989) 2, 16, 18

Court Rules

Federal Rules of Appellate Procedure, rule 35(a) 1

Federal Rules of Appellate Procedure, rule 40(a)(2) 1

Other Authorities

California Jury Instructions, Criminal [CALJIC] No. 1.03 13

California Jury Instructions, Criminal [CALJIC] No. 8.84.1 (4th Ed 1979) 3

01-99018

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, Petitioner-Appellant, **v.** **JEANNE WOODFORD, Warden,** Respondents-Appellees.	**CAPITAL CASE**

INTRODUCTION

Appellee respectfully seeks rehearing of this Court's order filed July 15, 2003. The Court's majority opinion overlooks or misapprehends particular points of law. FRAP 40(a)(2). In the alternative, Appellee seeks rehearing en

banc. FRAP 35(a). The majority held that it was reasonably likely the jury was misled to believe that it could not consider mitigating evidence of Belmontes' potential and good behavior in prison. This decision conflicts with, and misapplies the controlling standard for assessing constitutional error enunciated in, the United States Supreme Court's holding in *Boyde v. California*, 494 U.S. 370 (1990). The majority opinion also rests on a new rule in violation of *Teague v. Lane*, 489 U.S. 288 (1989). Accordingly, consideration by the full Court is necessary to maintain uniformity of decisions.

I.

THE MAJORITY OPINION CONFLICTS WITH THE SUPREME COURT'S HOLDING IN *BOYDE*

The majority of the panel in this case finds prejudicial error under the Eighth Amendment based on several instructions given by the trial court regarding the various circumstances the jurors may consider in determining whether Belmontes should receive a sentence of death or life in prison. As the majority notes, this finding ultimately hinges on the sufficiency of California's so-called "unadorned factor (k)" instruction which is, in essence, a "catch-all" mitigation instruction in capital cases.[1] Slip Opinion 9585. The majority opinion recognizes the Supreme Court has previously approved this very instruction

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[1] The jury here was instructed that, in determining the penalty to be imposed, they were to consider, among other things, "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Boyde v. California*, 494 U.S. at 372; California Jury Instructions, Criminal [CALJIC] No. 8.84.1 (4th Ed 1979); Slip Opinion 9570; RT 2494.

in *Boyde v. California*, 494 U.S. 370 (1990). The majority opinion distinguishes *Boyde*, however, by limiting its holding to cases in which the evidence in mitigation is limited to general information about the defendant's "background and character," which is offered to "tend to explain why the defendant committed the crime." Slip Opinion 9578. The majority insists this instruction, while acceptable in *Boyde*, was nonetheless insufficient in this case because it failed to inform the jurors they could consider the proffered evidence of Belmontes' former commitment to the California Youth Authority (CYA) in determining whether he might adjust well to a life in prison. This is so, the majority opines, because the instruction "does not apply to those forward-looking considerations" such as "the defendant's probable future conduct if incarcerated for life without the possibility of parole." Slip Opinion 9575, 9578.

The majority finds this alleged inadequacy of the "unadorned factor (k)" instruction, coupled with some of the trial judges informal answers to juror questions during deliberations, was reasonably likely to have misled the jurors to believe they were forbidden from considering Belmontes' evidence offered to show he "would live a productive life if permanently incarcerated in a structured environment." Slip Opinion 9585.

Appellee submits the majority opinion rests on a fundamental misapplication of *Boyde v. California*, 494 U.S. 370. In *Boyde*, the Supreme Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, the same instruction given in Belmontes' case. Boyde argued "that the 'catch-all' factor (k) [instruction] did not allow the jury to consider and give effect to non-crime related mitigating evidence,

because its language . . . limited the jury to other evidence that was *related to the crime*." *Boyde*, 494 U.S. at 378 (original emphasis). The Supreme Court rejected this contention. Considering the instruction "standing alone" the Court held there was not "a reasonable likelihood that the jury applied the instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380-81. The Court explained that, as was true in Belmontes' case, "the jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes consideration of a defendant's background and character." *Id.* at 382 (original emphasis). The *Boyde* Court found, therefore, that California's "catch-all" mitigation instruction was constitutional on its face because it permitted consideration of non-crime related evidence in mitigation. *Id.* at 380-82.

The majority opinion's attempt to distinguish *Boyde* is flawed from the outset because its initial premise is faulty. By its plain terms, *Boyde* is not limited to cases simply involving evidence of a defendant's "background and character," offered to "tend to explain why the defendant committed the crime." Slip Opinion 9578. To the contrary, the *Boyde* Court acknowledged that when the "factor (k)" instruction is considered in light of the other instructions given (which were also all given in this case), reasonable jurors would in fact realize they were to consider all pertinent evidence offered in mitigation, whether or not it related to the crime itself. *Boyde*, at 381-383.

Moreover, there is nothing in *Boyde* to suggest, as the majority opinion here finds, that the Supreme Court's holding would not apply with equal force to the mitigation evidence offered in this case. As the dissenting judge here found, the evidence supporting Belmontes' argument of

future institutional adjustment consisted solely of testimonials regarding his background and character during his CYA commitment, and "*Boyde* makes it perfectly clear that testimony relating to a defendant's pre-crime background and character is within the jury's purview under factor (k)." Slip Opinion 9592.

Indeed, the Supreme Court's holding in *Skipper v. South Carolina*, 476 U.S. 1 (1986) – upon which the majority opinion also relies – acknowledges that evidence of a defendant's prior incarceration, offered to show a likely future of conformity in prison, is in fact a form of character evidence: "[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character. . . . " *Skipper*, at 7. The Supreme Court in *Boyde* also rejected a claim that the "unadorned factor (k)" instruction did not permit the jury to consider, as required by *Skipper*, evidence that Boyde "could lead a useful life behind bars." As in the present case, the basis for asserting that Boyde might conform well to a future life in prison consisted of evidence of his prior accomplishments while incarcerated. The *Boyde* Court noted that, among other things, such evidence "did not pertain to prison behavior *after the crime for which he was sentenced to death*, as was the case in *Skipper*" but, rather, was simply additional evidence of good character which "the jury had the opportunity to conclude through factor (k) . . . extenuated the gravity of the crime because it showed that Boyde's criminal conduct was an aberration from otherwise good character." *Boyde*, at 382, n. 5 (emphasis added).

The majority opinion also emphasizes the *Boyde* Court's dictum about "the belief, long held by this society, that defendants who commit criminal acts that are

attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde*, at 382. The majority speculates that society has no such "long held view" about the mitigating effect of a defendant's likely future conduct. "Thus, in the absence of a clear instructions on point, jurors are not likely to be aware in determining the appropriate punishment in such cases that the defendant's potential for a positive adjustment to life in prison constitutes a proper mitigating factor. Slip Opinion 9578-79.

This pronouncement – that absent a clear instruction on the matter, jurors would not otherwise consider a defendant's future prospects for nonviolent institutional adjustment – is (1) at odds with common sense, (2) inconsistent with the Supreme Court's views on the matter, and (3) irrational in light of the record here. Indeed, the Supreme Court in *Skipper* expressly found the consideration of a defendant's prior good behavior in prison, offered as indicative of his character for probable future conduct if sentenced to life in prison, "is an *inevitable* . . . element of criminal sentencing that is by its nature relevant to the sentencing determination." *Skipper*, 476 U.S. at 5 (emphasis added).

There is virtually no chance the jury here, composed of presumably intelligent people, would have simply disregarded such an "inevitable" element of its sentencing determination and made an "elusive" distinction that precluded consideration of Belmontes' future adaptability to prison. *Skipper* at 7. This is especially true in light of the record here. As aptly summarized in the dissenting opinion, the jury heard, without objection, several witnesses testify about Belmontes' prior experience in CYA.

Belmontes himself asked the jury for life in prison because in prison "there is an opportunity to achieve goals and try to better yourself." (RT 2470.) He asked the jury to spare his life so he could "try to improve" himself. (RT 2470-71.) Belmontes' counsel then effectively argued that, in light of the evidence of Belmontes' prior CYA commitment, although he could not "make it on the outside," he could "fit[] into the system" and "contribute something" in the future. (RT 2474-79.) Even *the prosecutor* acknowledged that the jury could and *should* consider Belmontes' future prospects of a life in prison in determining the proper punishment: "And I think that value to the community [in the future] is something that you have to weigh in. There's something to that." (RT 2459-60.) Neither the court nor any of the parties or witnesses said anything to suggest the jury could not consider Belmontes' character of prior conformance while incarcerated in determining his likely future prospects.

As the dissent here noted, the majority's view that the jury nonetheless felt constrained to reject all such evidence and argument necessitates a finding "that the jury thought that the witnesses wasted their time by testifying, and that the prosecutor, Belmontes, and Belmontes' lawyer were not smart enough to realize they were all mistaken." Slip Opinion 9596. As was true in *Boyde*, it is unlikely that reasonable jurors would have believed the court's instructions somehow "transformed all of this 'favorable testimony [and unrebutted argument] into a virtual charade.'" *Boyde*, at 383-84 (quoting *California v. Brown*, 479 U.S. 538, 542 (1987).) The majority's finding to the contrary rests on an artificially restrictive interpretation of *Boyde* and an irrational assessment of the record. It should not stand.

II.

THE MAJORITY OPINION MISAPPLIES THE CONTROLLING STANDARD FOR ASSESSING CONSTITUTIONAL ERROR ENUNCIATED IN *BOYDE*

In assessing whether California's "unadorned factor (k)" instruction violates the Eighth Amendment, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, at 380. In making this determination, the "single instruction . . . may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, at 378.

Given the overall content of the instructions in this case, there is virtually no chance the jurors would have believed they were forbidden from considering the evidence at issue. Assuming *arguendo* the "unadorned factor (k)" instruction was somehow insufficient, the additional instructions clearly informed the jurors they could consider any mitigating factor established by the evidence, including Belmontes' likely future institutional adjustment. In addition to the court's directive that the jurors were to "consider all the evidence" in determining the penalty to be imposed, they were given the following special instruction:

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision

> that death is not the appropriate punishment in this case.

(RT 2496.) The majority concludes this special instruction somehow "exacerbated" the jury's alleged confusion because the second and third sentences of the instruction somehow served to undermine and contradict the plain meaning of the first sentence. Slip Opinion 9580.

Appellee respectfully submits that no reasonable juror could have interpreted the special instruction as the majority insists. The only reasonable reading of the first sentence is that the jury's determination of mitigating factors was not limited to those expressly enumerated. Logically, the jury could have only concluded they could consider other factors not enumerated. Moreover, the only reasonable interpretation of directive to "pay careful attention to each of these factors" and "any one of them standing alone may support a decision that death is not the appropriate punishment" is that the jury should consider *any* mitigating factor it found, *whether expressly listed or not.* Jurors would "naturally" and "inevitably" consider Belmontes' "past conduct as indicative of his proper future behavior." *Boyde*, at 382 fn. 5; *Skipper* at 5.

The majority also finds the trial judge "compounded the problem" with his informal answers to some juror questions during deliberations. Slip Opinion 9580-84. For the reasons discussed, there simply was no "problem" to compound. The jurors were expressly told their consideration of possible mitigating factors was not limited.

In any event, there is no reasonable chance the court's answers to the jurors misled them as the majority concludes. Juror Hern asked, "The statement about the aggravation and mitigation of the circumstances, now, that

was the listing." The court replied, "That was the listing, yes, ma'am." Juror Hern then asked, "Of those certain factors we were to decide one or the other and then balance the sheet?" The court replied, "That is right. It is a balancing process." A moment later, Juror Hailstone asked, "I don't know if it is permissible. Is it possible that he could have psychiatric during this time?" The court responded, "That is something you cannot consider in making your decision." (RT 2501-02.)

Juror Hern's inquiry did not convey a misunderstanding about the factors to be considered in the penalty phase deliberations. Her use of the word "listing" did not reflect a view that extenuating or mitigating circumstances were restricted to those specifically enumerated. Nor did her use of the metaphor, "balance the sheet," convey an unconstitutionally restrictive understanding of the jury's role in penalty phase determinations. Indeed, the court's answer to Juror Hern's question properly characterized the balancing process of penalty phase determinations under California law. See *People v. Bacigalupo*, 6 Cal.4th 457, 470 (1993). Moreover, the court's comment not to consider possible psychiatric treatment in prison was correct because no evidence even remotely relating to the matter had been presented. *People v. Crittenden*, 9 Cal.4th 83, 143-44 (1994); CALJIC 1.03.

Furthermore, immediately before the jurors asked these questions, the court directed them to "go over the instructions again with one another." (RT 2501.) Again, those instructions unambiguously informed the jurors that potential mitigation factors were not limited to those that had been enumerated. The court never said anything to indicate the jurors were limited or in any way restricted

from using any mitigating *evidence* in any way they saw fit.

In *Boyde*, the Court warned that, although there is a strong policy for accurate sentencing determinations in capital cases, "there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde*, at 380. The High Court has also held that a theoretical or abstract claim of improper jury instructions is insufficient to establish constitutional error. *Cupp v. Naughten,* 414 U.S. 141, 147-49 (1973).

The claimed error here is, at best, speculative and theoretical. As in *Boyde*, the "unadorned factor (k)" instruction here did not preclude the jurors from considering any evidence in mitigation. Like the evidence in *Boyde*, the evidence at issue here related to Belmontes' character, specifically his character for passive conformity in an institutional setting. There is no reason to believe the jury here was misled to disregard such evidence and the reasonable inferences to be drawn therefrom. This is particularly true because, as in *Boyde*, the jury here was expressly told to consider "all the evidence." (RT 2493.) Moreover, any possible confusion on this point was cured by the special instruction, which clearly stated the jury could consider additional mitigating factors beyond those enumerated.

Moreover, as the *Boyde* Court also observed:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process,

> with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde, at 380-81. Appellee respectfully submits the majority's finding of error does in fact rely on "technical hairsplitting" without regard for a commonsense understanding of the overall instructions and without consideration of what actually occurred in the penalty-phase trial. Moreover, the jury would not have made the "elusive" distinction between past conduct and future behavior suggested by the majority. *Skipper* at 6-7.

Again, the jurors here were instructed that they were not limited to any preordained mitigating circumstances and that their finding of any single mitigating circumstance could be sufficient to support a decision that the death penalty was inappropriate. Moreover, the closing statements by both parties made it clear the jury was to consider and weigh all of mitigating evidence, including Belmontes' future prospects in prison. (RT 2452-2462, 2472-2479.)

In sum, the jurors very clearly understood they could consider any evidence in mitigation and give any such evidence whatever weight they felt it deserved. There is virtually no chance, let alone a reasonable likelihood, the jurors interpreted or applied the instructions here to prevent them from considering any relevant evidence in mitigation.

III.

THE MAJORITY OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE V. LANE*, 489 U.S. 288[2]

Under *Teague*, a defendant may not receive federal habeas relief based on a new rule of federal constitutional law not "dictated by precedent existing when the judgment in question became final."[3] *Stringer v. Black*, 503 U.S. 222, 227-29 (1992); *Butler v. McKellar*, 494 U.S. 407 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Teague v. Lane*, 489 U.S. 288. Even when the asserted basis of a constitutional violation does not rest on a "new rule," habeas relief is still precluded where the prior precedent upon which it relies is applied in a "novel setting." *Stringer*, at 228; *Butler*, at 414-15. "The result in a given case is not dictated by precedent if it is susceptible to debate among reasonable minds, or, put differently, if reasonable jurists may disagree." *Graham v. Collins*, 506 U.S. 461, 476 (1993) (quoting *Stringer*, at 238, Souter, J., dissenting).

Belmontes' judgment became final when the Supreme Court denied certiorari of his direct appeal on January 17,

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[2] Appellee has not previously invoked *Teague* on this issue because the present configuration of Belmontes' claim of instructional error, based on the "unadorned factor (k)" instruction, emerged for the first time in the majority opinion. Belmontes' claim of instructional error on appeal rested solely on the court's answers to Juror Hern's questions during deliberations. Slip Opinion 9577; AOB 93-95.

[3] This rule is subject to two narrow exceptions: (1) where the new rule of law places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe and (2) where the new rule involves a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *Graham*, 506 U.S. at 478; *Teague*, 489 U.S. at 311. Neither of these exceptions are applicable here.

1989. *Belmontes v. Calderon*, 488 U.S. 1034 (1989); *Caspari*, 510 U.S. at 390. Prior to that time, there was no basis for reasonable jurists to disagree about the claim at issue because *no* controlling precedent had *ever* questioned the federal constitutional sufficiency of California's "unadorned factor (k)" instruction.

After Belmontes' judgment became final, the High Court issued its decision in *Boyde*. Even if *Boyde* were applicable under *Teague*, however, its holding only *reinforces* the reasonableness of the California Court's rejection of this claim. *Boyde* found no reasonable chance that this instruction, even "standing alone," would prevent a jury from considering any constitutionally relevant evidence." *Boyde*, 494 U.S. at 380-81. As discussed, the instruction at issue here did not "stand alone" but rather was accompanied by the special instruction that the mitigating factors were not limited to those expressly enumerated. In light of the record, the majority's opinion rests on, at the least, a "novel" interpretation of *Boyde*.

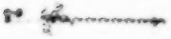
The majority opinion also relies on *Skipper v. South Carolina*, 476 U.S. 1. Unlike *Skipper*, there was no evidence here of the defendant's behavior *after the crime in question*. More importantly, unlike *Skipper*, this case involves no improper exclusion of mitigating evidence. Instead, the present matter merely involves an allegedly ambiguous jury instruction. The majority opinion, therefore, clearly was not dictated by *Skipper* but, rather, applied *Skipper* in an unpredictably "novel" manner. Such an interpretation is barred under *Teague*.

CONCLUSION

For the foregoing reasons, as well as those set forth in the pleadings on file, Appellee respectfully requests that the petition for rehearing be granted and, alternatively, that the Court grant rehearing en banc.

Dated: July 25, 2003

Respectfully submitted,



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No 01-99018

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FERNANDO BELMONTES,	)
Petitioner and Appellant,	)
vs.	)
JEANNE WOODFORD, WARDEN,	)
Respondent and Appellee.	)

APPELLANT'S RESPONSE TO APPELLEE'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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TOPICAL INDEX

APPELLANT'S RESPONSE TO APPELLEE'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC 1

I. THE MAJORITY OPINION CORRECTLY APPLIED *BOYDE* V. *CALIFORNIA* IN LIGHT OF THE PARTICULAR EVIDENCE PROFFERED BY APPELLANT AND THE MID-DELIBERATION MIS-INSTRUCTION BY THE TRIAL COURT 2

II. THE MAJORITY OPINION CORRECTLY APPLIED THE CONSTITUTIONALLY MANDATED STANDARD OF REVERSAL 10

III. THE MAJORITY OPINION CONSTITUTES A STRAIGHTFORWARD APPLICATION OF SETTLED UNITED STATES SUPREME COURT LAW 11

CONCLUSION 13

CERTIFICATE OF COMPLIANCE 14

STATEMENT OF RELATED CASES 14

TABLE OF AUTHORITIES

Belmontes v. *Woodford* 335 F.3d 1024 (2003) ..... passim

Bollenbach v. *United States* 326 U.S. 607 (1946) 9

Boyde v. *California* 494 U.S. 370 (1990) ..... passim

Brecht v. *Abrahamson* 507 U.S. 619 (1993) 11

California v. *Brown* 479 U.S. 538 (1987) 12

Eddings v. *Oklahoma* 455 U.S. 104 (1982) 12

Hitchcock v. *Dugger* 481 U.S. 393 (1987) 12

Kelly v. *South Carolina* 534 U.S. 246 (2002) 9

Lockett v. *Ohio* 438 U.S. 486 (1978) 12

Penry v. *Johnson* 532 U.S. 782 (2001)..... 7

Shafer v. *South Carolina* 532 U.S. 36 (2002)..... 9

Skipper v. *South Carolina* 476 U.S. 1 (1986)..... 5

Teague v. *Lane* 498 U.S. 288 (1989) 11

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Respondent and Appellee.

APPELLANT'S RESPONSE TO APPELLEE'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Appellant replies to appellee's petition for rehearing and petition for rehearing en banc as follows.

I. THE MAJORITY OPINION CORRECTLY APPLIED *BOYDE* V. *CALIFORNIA* IN LIGHT OF THE PARTICULAR EVIDENCE PROFFERED BY APPELLANT AND THE MID-DELIBERATION MISINSTRUCTION BY THE TRIAL COURT.

Appellee's ringing reaffirmation of *Boyde* v. *California,* 494 U.S. 370 (1990) is in fact a hollow exercise because it ducks any discussion of the mid-deliberation instructions that were most obviously violative of *Boyde* and the Supreme Court jurisprudence underpinning it. Appellee merely notes that "[t]he majority finds this alleged inadequacy of the 'unadorned factor (k)' instruction, *coupled with some of the trial judge*[']*s informal answers to juror questions during deliberations,* was reasonably likely to have misled the jurors to believe they were forbidden from considering Belmontes' evidence offered to show he 'would lead a productive life if permanently incarcerated in a structured environment'." Appellee's Petition for Rehearing ["PFR"], p. 4, emphasis supplied.

Nowhere in the argument does appellee again acknowledge, much less address, the mid-deliberation interchange in which jurors expressed manifest misunderstanding of their role, and in which the trial court affirmatively misled them as to that role. Appellee's failure to address the case-specific application of *Boyde* renders the remainder of his discussion essentially nugatory.

The majority explained its application of *Boyde* in the following manner:

> "We review this claim of instructional error under the approach set forth by the Supreme Court in *Boyde,* which directs us to determine whether there is a reasonable likelihood that the jury understood the instruction in a manner that resulted in its failure to consider constitutionally relevant evidence. 494 U.S. at 380. Although Belmontes' briefs emphasized the trial judge's mid-deliberation colloquy with juror Hern, [footnoted omitted] the Court has held that we must examine claims of instructional error in light of the record as a whole. Id. 377. Accordingly, *in assessing Belmontes' claim of instructional error, we consider the entire mid-deliberation colloquy as well as the original jury instructions.*" *Belmontes* v. *Woodford,* 335 F.3d 1024, 1063-1064 (2003) (emphasis supplied).

The majority then methodically examined the instructions given prior to deliberations, the instructions rejected prior to deliberations, and the instructions given *during* deliberations, before reaching an overall determination as to whether the jury was misled. This approach in no way *conflicts* with *Boyde*; rather, it is a straightforward application of *Boyde.*

In fact, it is *appellee* who takes a quote from *Boyde* out of context and alters its actual meaning in an effort to conjure up a misapplication of *Boyde.* Appellee offered the following incorrect characterization – "The Supreme Court in *Boyde* also rejected a claim that the 'unadorned factor (k)' instruction did not permit the jury to consider, as required by *Skipper,* evidence that *Boyde* 'could lead a useful life behind bars'." PFR, p. 6. The actual passage in

Boyde that contains the uncited quote expressly *distinguished* rather than *rejected* a claim that the factor (k) instruction precluded consideration of evidence that the defendant could lead a "useful life behind bars."

The Supreme Court expressly stated that Boyde had not *offered* his evidence of good prison conduct for the purpose of showing that he could lead a useful life behind bars, but rather to show that he had good character notwithstanding his difficult upbringing:

> "At oral argument (though not in his brief), counsel for petitioner also argued that testimony that Boyde won a prize for his dance choreography while in prison showed that he could lead a useful life behind bars, and that the jury must be able to consider that evidence as a mitigating circumstance under our decision in *Skipper* v. *South Carolina,* 476 U.S. 1 (1986). Factor (k), he argued, did not allow for such consideration. In *Skipper,* we held that a capital defendant must be permitted to introduce in mitigation evidence of post-crime good prison behavior to show that he would not pose a danger to the prison community if sentenced to life in prison rather than death. *The testimony that petitioner had won a dance contest while in prison, however, was introduced not to demonstrate that he was a 'model prisoner' like Skipper and therefore unlikely to present a risk of future danger, but to show that he had artistic ability.* Moreover, although the record is not clear on this point, petitioner apparently won the dance prize during the prison term served *prior* to the Gibson murder, and the evidence thus did not pertain to prison behavior after the crime for which he was sentenced to death, as was the case in *Skipper.* The testimony about dancing ability was presented as a part of

> petitioner's overall strategy to portray him as less culpable than other defendants due to his disadvantaged background and his character strengths in the face of those difficulties. As with other evidence of good character, therefore, the jury had the opportunity to conclude through factor (k) that petitioner's dancing ability extenuated the gravity of the crime because it showed that Boyde's criminal conduct was an aberration from otherwise good character." 494 U.S. at 382, fn. 5. (emphasis supplied)

Thus, *Boyde* was very clear that the unadorned factor (k) instruction did *not* necessarily or adequately direct a juror to consider evidence offered for the purpose of showing positive future adjustment and conduct while in prison. *Boyde* explicitly characterized the purpose for which Boyde's in-prison conduct had been offered as something *other* than positive future prison adjustment, in contrast to the evidence offered here. Thus, appellee is simply wrong in its assertion that *Boyde* rejected a claim that unadorned factor (k) instruction did not permit the jury to consider, as required by *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), evidence that a defendant "could lead a useful life behind bars."

On this specific point, the majority's understanding of *Boyde* is clearly correct. The majority took express note of the passage of *Boyde* quoted above from 494 U.S. at 382, fn. 5, and observed that "[a]t the least, the unadorned factor (k) instruction is ambiguous with respect to *Skipper's* requirement that the jury be permitted to consider and give effect to evidence bearing on defendant's probably future good conduct when it decides whether to impose the death penalty, see 476 U.S. at 5, and thus with respect to

the jury's right to consider Belmontes' most important mitigating evidence." 335 F.3d at 1065.

In sum, appellee has unsuccessfully attempted to fudge the *Boyde* decision by suggesting that *Boyde approved* the unadorned factor (k) instruction as a means of informing the jury of the proper consideration to be given to *Skipper* evidence of future good conduct. *Boyde* did no such thing, as the majority correctly recognized. However, that is not the most serious flaw in appellee's argument.

The most serious flaw is the complete failure to address the mid-deliberation colloquy where the trial court's instructions in response to juror questions were specific to the deliberations in this case and flatly violative of *Boyde* and its antecedents. Appellant concurs entirely in the majority's careful assessment of the import of the trial court's mid-deliberation instructions. 335 F.3d at 1065-1068.

There is one case-specific factual point that appellant would like to add to the majority's analysis. Appellee asserts that the instructions were adequate in light of the various factors, including an assertion that "[e]ven *the prosecutor* acknowledged that the jury could and *should* consider Belmontes' future prospects of a life in prison in determining the proper punishment – 'and I think that value to the community [in the future] is something that you have to weigh in. There's something to that' RT 2459-2460." PFR, pp. 8-9, emphasis in original. Appellee further asserts that "[n]either the court nor any of the parties or witnesses said anything to suggest the jury could not consider Belmontes' character of prior conformance while incarcerated in determining his likely future prospects." PFR, pp. 8-9 (emphasis in original). Appellee overlooks the

penalty arguments of both the prosecutor and defense counsel. Specifically, appellee overlooks the prosecutor's express statement to the jury that evidence of appellant's religious conversion while incarcerated did *not* fall within any of the enumerated statutory mitigating factors:

> "All right. With respect to these others, I suspect that you will be told – I can't imagine that you won't be told that defendant's religious experience is within the *catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime.*
>
> "*I'm not sure it really fits there. I'm not sure it really fits in any of them. But I think it appears to be a proper subject of consideration.*" RT 2458, Appellant's Excerpts of Record, No. 13, emphasis supplied.

This passage epitomizes the constitutionally unacceptable "mixed signals" as to the import of the mitigating evidence condemned in, inter alia, *Penry* v. *Johnson*, 532 U.S. 782, 802 (2001) [reversing death sentence because of internally contradictory and unclear instructions regarding sentencing responsibility]. The prosecutor clearly pointed out the anomaly of viewing evidence suggesting good future behavior as somehow "relat[ing] to the defendant at the time he committed the crime, extenuates the gravity of the crime." RT 2458. Thus, the prosecutor focused the jury's attention on the language of factor (k) and the disjuncture between the scope of the instruction and the evidence presented. The jury obviously recognized this disjuncture, as reflected in Juror Hern's questions to the trial court during deliberations.

Defense counsel's argument to the jury also acknowledged the inapplicability of factor (k) to the mitigation

evidence presented – "I'd like to comment about the evidence that we've presented and what Mr. Sueyres told you he thought it means *and I'm not going to insult you by telling you I think it excuses in any way what happened here,*" because "that is not the reason I asked these people to come in." RT 2473, Appellant's Excerpts of Record, No. 13. Read in a straightforward manner, defense counsel essentially conceded that the mitigating evidence did not excuse or extenuate the gravity of the crime "in any way," and thus did not quality as mitigating evidence of factor (k). The jury must necessarily have been left with at best a confused understanding of whether the evidence of future good conduct was cognizable in the penalty determination, and most likely with an understanding that the future good conduct component of the evidence was *not* contemplated within the permissible range of penalty considerations.

Appellee's failure to address the case-specific aspects of the jury instructions is most apparent in the failure to address the several questions posed by the jury during deliberations. First, as the majority notes, the jury declared a deadlock as to penalty, reflecting how closely balanced the penalty decision was for this jury. Next, Juror Hern attempted to clarify and/or simplify the decision by eliciting confirmation from the trial court that there was a finite list of penalty considerations; and that the jury's responsibility was in effect that of a legal accountant to "balance the sheet." The trial court erroneously confirmed that narrow and unconstitutional characterization of the jury's role. The correct response necessarily entailed an instruction that the jury's responsibility was to give a "reasoned moral response" to the totality of admissible evidence. See *Penry* v. *Johnson,*

supra, 532 U.S. at 788. In sum, respondent's characterization of the mid-deliberation colloquy as "mere informal answers to juror questions" undeserving of consideration flouts the teaching of the United States Supreme Court from *Bollenbach* v. *United States,* 326 U.S. 607 (1946) through *Shafer* v. *South Carolina,* 532 U.S. 36, 53 (2002) [recognizing that a question from a capital jury during deliberation leaves "no doubt about [the jury's failure to gain from . . . the judge's instructions any clear understanding of what a life sentence means"] through *Kelly* v. *South Carolina,* 534 U.S. 246, 256 (2002) [observing that "the jurors' questions in *Simmons* and *Shafer* confirm the inadequacy of the charges in those cases . . . "]. The majority correctly understood and applied *Boyde* to the unusual, if not unique, facts of this case.

II. THE MAJORITY OPINION CORRECTLY APPLIED THE CONSTITUTIONALLY MANDATED STANDARD OF REVERSAL.

Appellee's argument here is a functional reiteration of the first argument regarding the correctness of the instructions. In this section, however, appellee does refer to the mid-deliberation questions from the jurors and responses by the trial court. However, respondent's discussion does not illuminate the issue, in as much as it consists of a series of ipse dixits – "Her [Juror Hern's] use of the word 'listing' did not reflect a view that extenuating or mitigating circumstances were restricted to those specifically enumerated"; "nor did her use of the metaphor, 'balance the sheet,' convey an unconstitutionally restrictive understanding of the jurors' role in penalty phase determinations", all verbatim reiterations from appellee' s brief in this court PFR 12.

Appellee fails to address that portion of Juror Hern's question where she initially obtained confirmation from the trial court that there was a single "listing" of aggravating and mitigating circumstances, followed by a further confirmation in the form of a question, "*of those certain factors* we were to decide one or the other and then balance the sheet?" Emphasis supplied. Appellee simply refuses to acknowledge that Juror Hern's descriptions are consistent *only* with a closed-ended list of factors, *not* with an *open-ended* set of factors that would include evidence of positive future institutional adjustment.

Appellee does not seriously suggest that the majority applied an incorrect legal standard, nor could any such claim be credibly made in view of the majority's careful application of the *Boyde* standard to the effect of the instructions, 335 F.3d at 1065, coupled with its harmless error application of *Brecht* v. *Abrahamson,* 507 U.S. 619 (1993). See 335 F.3d at 1068-1071. Rather, appellee merely asserts that "The claimed error here is, at best, speculative and theoretical," a characterization belied by the record as determined by the majority.

III. THE MAJORITY OPINION CONSTITUTES A STRAIGHTFORWARD APPLICATION OF SETTLED UNITED STATES SUPREME COURT LAW.

Appellee asserts for the first time that the majority's decision is barred by the rule of *Teague* v. *Lane,* 498 U.S. 288 (1989), in its reliance on *Boyde,* supra, which was issued after appellant's state court judgment became final. PFR 17. This is a surprising claim, given that appellee cited and relied on *Boyde* in appellee's brief in this Court as setting forth the correct standard of review on this issue. In any case, the controlling principle governing this

issue was promulgated by the United States Supreme Court long before the state appeal in this case was concluded, inter alia, *Hitchcock* v. *Dugger,* 481 U.S. 393 (1987); *Lockett* v. *Ohio,* 438 U.S. 486 (1978); *Eddings* v. *Oklahoma,* 455 U.S. 104 (1982); and *California* v. *Brown,* 479 U.S. 538 (1987).

Hitchcock v. *Dugger,* supra, vacated a death sentence because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper* v. *South Carolina* [citation], *Eddings* v. *Oklahoma* [citation], and *Lockett* v. *Ohio* [citation]." 481 U.S. at 398-399. The Florida statute in question included a phrase that mitigating circumstances "shall be the following," accompanied by a list and noted that "the Florida Legislature has since removed the phrase 'as enumerated [in the statutory list]' from the provisions requiring the advisory jury and the sentencing judge to consider mitigating circumstances." Id. at 397.

The legal predicate of *Hitchcock,* supra, and its antecedents are indisputably applicable to this case, and the factual predicate of an improper restriction to a finite and close-ended list of mitigating factors is functionally indistinguishable. This newly discovered *Teague* argument is without merit. See Appellant's Reply Brief – "Appellant has been arguing . . . since the direct appeal in 1982 [that] this mid-deliberation instruction constituted an Eighth Amendment violation under controlling authority of the United States Supreme Court, including *Hitchcock* v. *Dugger,* 481 U.S. 393 (1987)." Appellant's Reply Brief, p. 44. The fact that the majority and dissenting opinions in this case spent considerable time discussing *Boyde* v.

California, supra, in no way impugns the preexisting and settled law of the United States Supreme Court regarding consideration of mitigating evidence that dictated the result in this case.

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court deny the Petition for Rehearing and Petition for Rehearing En Banc.

Dated: September 8, 2003

Respectfully submitted,

/s/ [Illegible]
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FERNANDO BELMONTES

[Certificate Of Compliance, Statement Of Related Cases And Declaration Of Service Omitted In Printing]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, JR., Petitioner-Appellant, v. JILL L. BROWN, Warden, for the California State Prison at San Quentin, Respondent-Appellee.	No. 01-99018 D.C. No. CV-89-00736-DFL Eastern District of California, Sacramento ORDER (Filed Aug. 2, 2005)

Before: REINHARDT, Circuit Judges.

The parties shall file, within 21 days of the date of this order, briefs not exceeding 15 pages in length (50 copies each) setting forth their respective positions on whether the case should be reheard en banc.

01-99018

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, JR., Petitioner-Appellant, **v.** **JILL L. BROWN, Warden for the California State Prison at San Quentin** Respondent-Appellee.	**CAPITAL CASE**

On Appeal from the United States District Court
for the Eastern District of California
No. CIV S-89-00736 DFL
David F. Levi, Judge

APPELLEE'S BRIEF RE: HEARING EN BANC

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TABLE OF CONTENTS

	Page
A. Procedural Background Following The Submission Of The Appeal	1
B. Appellee Welcomes The Opportunity To Have This Court Review This Case En Banc	3
CONCLUSION	13

01-99018

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, JR., Petitioner-Appellant, **v.** **JILL L. BROWN, Warden for the California State Prison at San Quentin** Respondent-Appellee.	**CAPITAL CASE**

Appellee John Stokes[1] hereby submits the following pursuant to Circuit Rule 35-2 and in response to this Court's August 2, 2005, order for briefing:

[1] John Stokes has recently replaced Jill Brown as acting warden of San Quentin State Prison. Mr. Stokes should be substituted as Respondent-Appellee in this matter.

A. Procedural Background Following The Submission Of The Appeal

On July 15, 2003, a panel majority of this Court issued an opinion reversing the penalty phase judgment in this case on the grounds of alleged instructional error. *See Belmontes v. Woodford,* 335 F.3d 1024 (9th Cir. 2003).[2] Appellee submitted a timely petition for rehearing and suggestion for rehearing en banc. In an order issued on February 5, 2004, the panel denied rehearing, and a majority of the full court rejected the petition for rehearing en banc. *See Belmontes v. Woodford,* 359 F.3d 1079 (9th Cir. 2004).

Thereafter, Appellee filed a petition for writ of certiorari in the United States Supreme Court. On March 28, 2005, the High Court granted certiorari, vacated the judgment, and remanded the matter to this Court for further consideration in light of *Brown v. Payton,* 544 U.S. ___, 125 S.Ct. 1432 (2005). *See Brown v. Belmontes,* ___ U.S. ___, 125 S.Ct. 1697 (2005).

Following remand, the same panel majority issued another opinion on July 15, 2005. The new decision reversed the penalty phase judgment for the same reasons set forth in the previous decision. The panel majority found that *Payton* did not affect the outcome here because *Payton* was governed by the AEDPA (*see* 28 U.S.C. § 2254), and *Belmontes* is not.

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[2] The opinion was superseded with no substantive changes on November 20, 2003. *See Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003).

On August 2, 2005, this Court ordered the parties to submit briefing setting forth their respective positions on whether the case should be reheard en banc.

B. Appellee Welcomes The Opportunity To Have This Court Review This Case En Banc

As noted above, Appellee previously sought rehearing and rehearing en banc immediately after the panel issued its first decision in this case. These requests were denied nearly seven months later. After the Supreme Court reversed the earlier decision and remanded the case for reconsideration, the panel again ordered federal habeas relief for the same reasons set forth in the earlier decision. In an effort to avoid any further delay, Appellee opted not to file another petition for en banc review. Instead, Appellee obtained a 90-day stay on the issuance of the mandate in order to file another petition for writ of certiorari in the United States Supreme Court.

Appellee is now precluded from requesting en banc rehearing because the time for filing such a petition expired on July 29, 2005 – 14 days after the entry of judgment. *See* Fed.R.App.Proc., rules 35(c), 40(1). However, this Court retains the option of ordering en banc review sua sponte. Fed. R. App. Proc., rule 35(a); Circuit Rule 35-2. Respondent respectfully submits that such an order should issue in this case.

The panel majority's order for habeas relief in this case turns on the finding that California's so-called "unadorned factor (k)" instruction, previously given in capital cases, violated the Eight Amendment in this case. In this regard, the majority found that the instruction was constitutionally insufficient to inform the jurors that they could

consider "forward-looking" evidence of Appellant's future prospects as a life prisoner in determining whether death was the appropriate punishment. As explained fully in Appellee's previous petition for rehearing en banc, this finding is inconsistent with the United States Supreme Court's decision in *Boyde v. California,* 494 U.S. 370 (1990), violates the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), and is irreconcilable with the facts of this case. In the interest of economy, Appellee hereby incorporates as though fully set forth the reasoning advanced in support of the earlier petition for rehearing en banc. For this Court's convenience, a copy of the previous petition is appended to this brief.

Indeed, the United States Supreme Court's recent decision in *Payton* further confirms the sufficiency of the "unadorned factor (k)" instruction in this case. Although *Payton* was decided under the AEDPA, the High Court nonetheless found that, as a general matter, jurors would understand the factor (k) as encompassing evidence bearing on a defendant's character after the crime:

> After all, *Boyde* held that factor (k) directed consideration of any circumstance that might excuse the crime, and it is not unreasonable to believe that a postcrime character transformation could do so. Indeed, to accept the view that such evidence could not because it occurred after the crime, one would have to reach the surprising conclusion that remorse could never serve to lessen or excuse a crime. But remorse, which by definition can only be experienced after a crime's commission, is something commonly thought to lessen or excuse a defendant's culpability.

(*Payton*, at 1439.) This reasoning applies with equal force to the "forward-looking" evidence presented in Appellant's case. Background and character evidence, offered to show a likelihood of passive adjustment to a life in prison and worthwhile future prospects, would be reasonably understood by jurors as "extenuating" or diminishing the overall "gravity" of the offenses. Indeed, such a "forward-looking inquiry *is not independent of an assessment of moral culpability*." *Johnson v. Texas*, 509 U.S. 350, 369 (1993) (emphasis added) (*see also Skipper v. South Carolina*, 476 U.S. 1, 7 (1986) ["a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character. . . ."].)

In addition to the various reasons set forth in *Payton* and in Appellee's previous petition, Appellee also submits that en banc review is appropriate in this case because Appellant has *never before* raised *any* claim about the factor (k) instruction giving insufficient guidance with respect to "forward-looking" evidence of institutional adjustment or good future prospects. Appellant's sole claim regarding the factor (k) instruction in the California courts was that it provided insufficient guidance "on the proper role of sympathy and general character and background evidence." *People v. Belmontes*, 45 Cal.3d 744, 799 (1988).[3] Petitioner never complained that the instruction was insufficient with respect to "forward-looking" evidence of his future prospects. Because Appellant never presented the state courts with either the factual or legal basis of this present claim of instructional error, the claim is

[3] This is the precise claim that the Supreme Court subsequently addressed and expressly rejected in *Boyde v. California*, 494 U.S. at 380-382.

unexhausted and, therefore, cannot provide grounds for federal habeas relief *Duncan v. Henry,* 513 U.S. 364, 365 (1995) (per curiam); *Gray v. Netherland,* 518 U.S. 152, 163 (1996).

Moreover, at no time during the many years of federal habeas litigation did Appellant ever claim that the factor (k) instruction was insufficient with respect to "forward-looking" evidence. Because Appellant did not raise any such claim before the district court, he may not obtain relief on this claim now. *See Park v. California,* 202 F.3d 1146, 1155 (9th Cir. 2000) (refusing to consider claims not properly raised in the habeas petition before the district court).

Nor did Appellant *ever* seek to raise any complaint concerning the factor (k) instruction on appeal to this Court.[4] Because the scope of appellate re habeas cases is limited to issues specified in the certificate of appealability (*see* 28 U.S.C. § 2253(c)), Appellant may not obtain relief on this issue for which he has never sought appellate review.[5] *See Hiivala v. Wood,* 195 F.3d 1098, 1102-1103

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[4] For this reason, Appellee had no reason, and had no opportunity, to address anything concerning the constitutional viability of the factor (k) instruction in the original Appellee's brief. However, in Appellee's previous petition for rehearing and suggestion for rehearing en banc, Appellee did raise the matter of Appellant's failure to raise any previous challenge to the instruction. Appellee also brought this matter to the high court's attention in the previous petition for writ of certiorari.

[5] Indeed, Appellant's *first mention* of the factor (k) instruction came in his reply brief. This was in connection with a claim that *dealt exclusively* with the trial court's allegedly improper answers to some of the jurors' informal inquiries during penalty phase deliberations. (*See* Appellant's Reply Brief, pp. 44-51.) Even assuming that Appellant is somehow deemed to have challenged the factor (k) instruction by merely *mentioning* it in the reply brief, any such claim would be

(Continued on following page)

(9th Cir. 1999) (per curium) (concluding that a court of appeals' review is limited to issues specified in the COA). This rule applies to all habeas appeals filed after the effective date of the AEDPA, regardless of when the underlying habeas petition was filed.[6] *Slack v. McDaniel*, 529 U.S. 473, 481-482 (2000) (*see also Lambright v. Stewart*, 220 F.3d 1022, 1024 (9th Cir. 2000); *Nevius v. McDaniel*, 218 F.3d 940, 942 (9th Cir. 2000)).

For these reasons, Appellee respectfully submits that this Court should conduct en banc review in this case. Appellee further submits that such review should encompass *all* of the outstanding issues on appeal. Such review is not only appropriate, but is necessary, in order to achieve a timely final resolution in this matter and to avoid the substantial delay and expense associated with further piecemeal litigation.

Indeed, the delay occasioned by the federal habeas proceedings in this case has already been profound. Appellant committed the murder for which he now stands convicted in March 1981. A judgment of death was officially entered in October 1982. Appellant's judgment and sentence of death were affirmed by the California Supreme Court on June 23, 1988 (*People v. Belmontes*, 45 Cal.3d 744), and the judgment became final on January 17, 1989, after the Supreme Court denied his request for certiorari. *Belmontes v. Calderon*, 488 U.S. 1044 (1989).

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waived. *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam); *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990).

[6] This appeal was filed many years after the 1996 effective date of the AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997).

Appellant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of California in May 1989. Appellant simultaneously requested and received permission to stay federal habeas proceedings while he sought to exhaust his state court remedies for various new claims. Over the next several years, Appellant obtained many more stays and time extensions while he endeavored to raise and exhaust even more new claims. During these years, Appellant did little more than present "bare bones" allegations, accompanied with superficial assertions of constitutional error, to the various state courts. Although these perfunctory efforts were wholly insufficient to perfect Appellant's various claims for federal habeas review (*Rose v. Lundy,* 455 U.S. 509 (1982); *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992)), Appellee was nonetheless permitted to proceed with these claims, despite Appellee's repeated objections.

Appellant filed an amended habeas petition in the district court on November 4, 1994 – over five years after the original petition was filed. The parties thoroughly litigated all of Appellant's numerous claims for many years thereafter. During this period, the district court gave Appellant virtual carte blanche leave to conduct broad-sweeping discovery in order to substantiate, augment, or amend his claims in any manner he saw fit. Although Appellant raised literally dozens of claims, he always placed the main emphasis of the litigation on his claim of ineffective assistance of counsel in his penalty phase trial. Nearly twelve years after Appellant filed his original petition, and over six and a half years after he filed his amended petition, the district court issued a final judgment denying habeas relief on May 14, 2001.

Appellant then sought review in this Court. The parties submitted their respective briefs by August 2002, over a year after the habeas petition had been denied. On December 5, 2002, the three-judge panel heard well over two hours of oral argument, and the case was submitted for a final decision as to all claims. As was true in the district court, the issue of alleged ineffective assistance of counsel in the penalty phase predominated the appellate briefs and the oral argument.

Over seven months later, the panel issued its initial opinion. Because a majority of the panel found reversible error based on the previously-unmentioned issue of the factor (k) instruction, they did not reach the primary claim of ineffective assistance in the penalty phase trial.[7]

Nearly seven more months passed before this Court denied Appellee's petition for rehearing and suggestion for rehearing en banc. Thereafter, over another year elapsed until the Supreme Court granted Appellee's petition for certiorari, reversed the judgment, and remanded the matter for further consideration. On remand, the same panel majority has again found the "unadorned factor (k)" instruction to be constitutionally infirm. Consequently, the panel majority has again left the claim of ineffective assistance unresolved.[8]

If this Court opts to undertake en banc review in this case, but nonetheless limits the review to the issue of the "unadorned factor (k)," the losing party will unquestionably

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[7] Justice O'Scannlain did address this claim in his dissenting opinion and found the claim to be without merit.

[8] Again, Justice O'Scannlain addressed this claim in dissent and found it to be meritless.

seek certiorari in the Supreme Court.[9] In the event Appellee were ultimately to prevail on this issue, the case would again be returned to the panel for further review of the remaining claims. Even if the panel were to reach a resolution of *all* the remaining issues at that point[10], the losing party would then, without question, once again seek en banc rehearing before this Court, or petition for certiorari before the Supreme Court, or both.

The issues in this case have all been submitted for decision for approaching three years. Neither of the parties to this action have any judicially-cognizable interest in engaging in any further protracted appellate litigation.

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[9] Indeed, this Court should be aware that Appellee will be filing a petition for certiorari on this issue within the next few weeks. Immediately after the panel issued its most recent judgment, Appellee obtained a 90-day stay of mandate to allow Appellee to file a certiorari petition. Because Appellee opted not to file another petition for rehearing following this latest panel opinion, nothing has occurred in this case to toll the time for filing a petition for certiorari within the 90-day period set forth in Supreme Court Rule 13. As noted above, the time has now passed for Appellee to toll this period by filing a timely request for en banc rehearing. Accordingly, Appellee must now file a timely petition for writ of certiorari to avoid the prospect of forever relinquishing the right to seek such review. In the event that this Court orders en banc review in this case, Appellee will, of course, notify the Supreme Court immediately and ask the High Court to withhold consideration of Appellee's certiorari petition pending the outcome of the en banc panel's decision.

[10] Although the issue of trial counsel's alleged incompetence in the penalty phase trial is the only remaining claim of any substance, still pending are three perfunctory claims involving: (1) allowing evidence of prior unadjudicated criminal acts in the penalty phase trial (AOB 95); (2) allegedly improper responses to jurors' questions about the possible consequences of a hung jury in the penalty phase (AOB 99); and (3) alleged error resulting from a letter from the trial judge sent to the jurors following the penalty phase verdict. (AOB 100.)

Accordingly, Appellee welcomes the opportunity to resolve this case via en banc review as an alternative to seeking certiorari. The interests of efficient judicial administration, economy, and fundamental fairness all counsel strongly in favor of en banc review to address all pending issues in order to arrive at a final resolution of this habeas corpus appeal. To do otherwise would quite likely entail several more years of costly litigation, heaping even more weight onto this already heavily-burdened case, and would likely siphon a great deal more from the already shallow reservoir of scarce federal and state judicial resources.

CONCLUSION

For the reasons set forth above, Appellee respectfully submits that this case is appropriate for en banc review. In the event that this Court orders en banc review, Appellee urges that such review should encompass all of the pending issues in this case in order to arrive at a long-awaited resolution of this habeas corpus appeal.

Dated: August 22, 2005

Respectfully submitted,

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No. 01-99018

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, Petitioner and Appellant, v. JILL BROWN, Warden, Respondent and Appellee.	)	DC No. CV-89-0736-DFL

APPELLANT'S BRIEF REGARDING REHEARING EN BANC

[Death Penalty Case]

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TOPICAL INDEX

PROCEDURAL POSTURE 1

STANDARD FOR GRANTING REHEARING EN BANC 2

APPLICATION OF THE RULE 35 STANDARD TO THIS CASE 2

A. Prior Denial of Rehearing En Banc on the Merits is a Sufficient Basis to Refuse Rehearing En Banc on the Merits Now 3

B. The Demonstrable Difference in the Standards of Review Applicable to this Case vs. Payton. 5

C. The Absence of Any Need for Rehearing En Banc to Maintain Decisional Uniformity or to Resolve a Question of "Exceptional Importance" 5

CONCLUSION 8

CERTIFICATE OF COMPLIANCE 8

TABLE OF AUTHORITIES

Cases

Belmontes v. Woodford [*Belmontes I*] 2
350 F.3d 861 (9th Cir. 2003)

Belmontes v. Brown [*Belmontes II*] 2
414 F.3d 1094 (9th Cir. 2005)

Boyde v. California 7
494 U.S. 370 (1990)

Brown v. Payton ..... passim
544 U.S. ___, 125 S.Ct. 1432 (2005)

Harris v. Vasquez 6
949 F.2d 1497, 1545 (9th Cir. 1990)

In re Murchison 4
349 U.S. 133 (1955)

Moody v. Albemarle Paper Co. 7
417 U.S. 622, 626 (1974)

United States v. Alpine Land & Reservoir Co. 3
291 F.3d 1062 (9th Cir. 2002)

United States v. American-Foreign S.S. Corp. 7
363 U.S. 685, 690 (1960)

United States v. Arnpriester 4
37 F.3d 466 (9th Cir. 1994)

Statutes and Rules

Rule 35, F.R.A.P. ..... passim

Rule 40, F.R.A.P. 2

Cal. Penal Code section 190.3 4

No. 01-99018

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, Petitioner and Appellant, v. JILL BROWN, Warden, San Quentin State Prison, Respondent and Appellee.	DC No. CV-89-0736-DFL

APPELLANT'S BRIEF
REGARDING REHEARING EN BANC

Appellant Fernando Belmontes, through his attorneys Eric S. Multhaup and Christopher H. Wing, submits this brief in response to this Court's Order of August 2, 2005, directing the parties to set forth their positions on whether the case should be heard en banc.

PROCEDURAL POSTURE

Following the remand by the United States Supreme Court with directions that this court reconsider its opinion of July 15, 2003, in light of *Brown v. Payton*, 544 U.S. ___, 125 S.Ct. 1432 (2005), this Court filed a revised opinion on

July 15, 2005, *Belmontes v. Brown*, 414 F.3d 1094. Appellee sought and obtained a stay of the issuance of mandate for a period of 90 days to decide whether the petition for certiorari. Appellee did not file a petition for rehearing of the panel decision pursuant to Rule 40, F.R.A.P., nor any petition for rehearing en banc pursuant to Rule 35, F.R.A.P. Appellee *did* petition for rehearing en banc from the prior 2003 decision of the panel, and that petition was denied on February 5, 2004.

STANDARD FOR GRANTING REHEARING EN BANC

Rule 35(a) provides in pertinent part:

An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

APPLICATION OF THE RULE 35 STANDARD TO THIS CASE

The panel opinion of July 15, 2005, consists of two parts. The first is entitled "Preamble", and discusses whether the *Payton* decision has any effect upon the prior opinion of July 15, 2003, *Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003). The panel concluded that "[h]aving reviewed *Payton*, and our previous independent determination of the constitutional question at issue, we find no

reason to change our judgment on the matter", and reaffirmed the prior opinion. *Belmontes v. Brown*, supra.

A. The Prior Denial of Rehearing En Banc on the Merits is a Sufficient Basis to Refuse Rehearing En Banc on the Merits Now.

The second portion of the opinion from the Introduction through the Conclusion consists of a reiteration and reaffirmation of the prior opinion. Under settled Ninth Circuit law, the second portion of the opinion related to the merits of petitioner's habeas corpus claims is *not* a proper basis for en banc hearing because this Court has already *denied* hearing en banc as to those issues.

United States v. Alpine Land & Reservoir Co., 291 F.3d 1062, 1073 (9th Cir. 2002) denied a petition for rehearing en banc in large part because the identical issue on which rehearing was sought had *previously* been the subject of a denial of rehearing en banc in an earlier appeal in the same case:

> [W]e deny Whitehead's petition. *A petition for rehearing en banc on the identical issue has already been rejected in Alpine III*. See Orr Water Ditch, 256 F.3d at 944. Moreover, this issue does not meet the Ninth Circuit's criteria for rehearing en banc – its resolution is not necessary to secure uniformity of decisions or to decide a question of exceptional importance. See United States v. Burdeau, 180 F.3d 1091, 1092 (9th Cir. 1999) (Tashima, J., concurring). To the contrary, the only opinions addressing this issue uniformly hold that 1902 is not the relevant initiation date for forfeiture purposes. *Although the water rights issues presented are clearly significant, this court has already held that they were not exceptional*

enough to warrant en banc review. Id. at 1073 (emphasis supplied).

The same considerations militate against an en banc rehearing in this case. The issues regarding the impact of the general CALJIC jury instruction that defines mitigation under Cal. Penal Code section 190.3(k) ["Factor [k]"] and of the specific mid-deliberation instructions in response to juror questions were fully raised in the petition for rehearing in *Belmontes I*. This Court's prior denial of the petition for rehearing en banc militates against hearing en banc now for the same reasons relied on in *Alpine Land*, supra.[1]

Judge O'Scannlain's dissent is virtually verbatim identical with his dissent in *Belmontes I*, differing only in the inclusion of citations to *Payton*, supra, without any change in the analysis. Thus, there are no new grounds for reaching a different result as to the propriety of hearing en banc, unless *Payton* significantly changed the standard of review applicable to this pre-A.E.D.P.A case. It did not by its own terms, see *Payton*, supra, 125 S.Ct. at 1442, as discussed below in Part B.

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[1] It should be noted that Judge Callahan wrote an opinion dissenting from the order denying hearing en banc in which seven other judges joined. Counsel of appellant believes that it is inappropriate for Judge Callahan to participate in any deliberations or voting on this case, because she was employed as a Deputy District Attorney in San Joaquin at all times while the trial prosecution was pending. This type of prosecutorial employment is generally recognized as a ground for recusal of the former prosecutor from sitting as a judge in the same case. See *In re Murchison*, 349 U.S. 133 (1955); *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994). Appellant therefore objects to any further participation in this case by Judge Callahan.

B. The Demonstrable Difference in the Standards of Review Applicable to this Case vs. *Payton*.

The issue on which certiorari was granted in *Payton* was "whether the Ninth Circuit's decision was contrary to the limits on federal habeas review imposed by 28 U.S.C. § 2254(d)", 125 S.Ct. 1435, and the narrow holding of the Supreme Court was that "[e]ven were we to assume the "'relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" Lockyer v. Andrade, 538 U.S. 63, 76, 155 L. Ed. 2d 144, 123 S. Ct. 1166 (2003) (quoting Williams v. Taylor, 529 U.S., at 411, 146 L. Ed. 2d 389, 120 S. Ct. 1495), there is no basis for further concluding that the application of our precedents was 'objectively unreasonable.'" 145 S.Ct. at 1442. Nothing in that holding calls for further consideration of whether the state court decision incorrectly applied federal constitutional law, and therefore nothing in that holding provides a basis for an en banc hearing at this time

C. The Absence of Any Need for Rehearing En Banc to Maintain Decisional Uniformity or to Resolve a Question of "Exceptional Importance".

The panel decision in this case turns on a fact-specific combination of circumstances, consisting of (1) an unusual profile of mitigating evidence presented on petitioner's behalf at trial; (2) the impact of a now-discarded pattern jury instruction; and (3) the idiosyncratic impact of a case-specific mid-deliberation interchange between the trial judge and the jury. This combination of circumstances if virtually guaranteed *not* to recur, because the pattern instruction is defunct and the mid-deliberation instructional interchange is idiosyncratic to this case. There is very little basis for viewing the issue decided here as one

of "exceptional importance" given that it is so case- and fact-specific, and so *un*likely to recur.

The very uniqueness of the factual circumstances underlying the legal resolution of the claim further explains why there is no need for a hearing en banc to "maintain uniformity of the court's decisions", the other criterion for an en banc hearing, *Payton* is the only case that has reasonably related issue, which have been resolved by the United States Supreme Court, there is no other decision within this Court's jurisprudence that colorably conflicts with the panel's resolution.

While this is a capital appeal, the mere fact that an issue arises in a death penalty case does not necessarily and by itself confer "exceptional importance" on the issue. While some individual judges have expressed the view that a substantial issue in a capital appeal qualifies as a question of exceptional importance, see e.g., *Harris v. Vasquez*, 949 F.2d 1497, 1545 (9th Cir. 1990) (Reinhardt, J., dissenting from denial of order denying rehearing en banc), that position has not been adopted by this circuit, or by any other Circuit.

Rather, as the Supreme Court has observed, the en banc procedure was devised by Congress to permit "the wise use of this exceptional power to 'determine the major doctrinal trends of the future' for a particular circuit". *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626 (1974), quoting from *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 690 ( ). The questions presented in this case have virtually no potential to "determine the major doctrinal trends of the future", because they must be decided under a standard of review from the past, now superseded by the A.E.D.P.A.. The A.E.D.P.A. cases such

as *Payton* have potential to determine major doctrinal trends, but this case does not.

The dissenting opinion of Judge O'Scannlain speaks at length against the correctness of the panel decision as it applied the Supreme Court precedents of *Boyde v. California*, 494 U.S. 370 (1990) and *Brown v. Payton*, supra, to the facts of this case. However, there is nothing in the dissent that suggests that rehearing en banc is necessary to "determine [any] major doctrinal trends of the future". Rather, the dissent is premised on the view that the major doctrinal issues have been *settled* by the Supreme Court, but that the panel majority failed to correctly apply those settled precedents. By its own terms, the dissenting opinion provides no basis for rehearing en banc under the standards of Rule 35.

CONCLUSION

Wherefore, for the foregoing reasons, appellant urges this Court not to order a rehearing en banc.

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Respectfully submitted

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